

# **Rape Unresolved**

Policing Sexual Offences in South Africa



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DEE SMYTHE



*Rape Unresolved: Policing Sexual Offences in South Africa*

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# Abbreviations

ANC	African National Congress
CAS	Crime Administration System
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIAC	Crime Information Analysis Centre
CLS	Centre for Law and Society
DVA	Domestic Violence Act
FCS	Family Violence, Child Protection and Sexual Offences
GBH	Grievous Bodily Harm
KZN	KwaZulu–Natal
NCCS	National Crime Combating Strategy
NCPS	National Crime Prevention Strategy
NGO	Non-government Organisation
NPA	National Prosecuting Authority
SADC	Southern African Development Community
SAPS	South African Police Service
SAP	South African Police
SPSS	Statistical Programme for Social Scientists
UN	United Nations





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Finally, I was privileged to serve for five years as a trustee of the Rape Crisis Cape Town Trust. Established in 1976, it is the oldest organisation in South Africa supporting the recovery of rape survivors. Rape Crisis has a vision of a South Africa in which women are safe in their communities and where the criminal justice system supports and empowers rape survivors. Its mission is to promote an end to violence against women, specifically rape, and to assist women to achieve the right to live free from violence by reducing the trauma experienced by rape survivors, encouraging reporting of rape incidents and facilitating the active engagement of communities in challenging high rape rates and flaws in the criminal justice system. At the heart of this vision is a remarkable group of staff and volunteers, supported almost entirely by donations, who provide counselling and support to more than 5 000 new clients a year. I dedicate this book to them and to the women whose stories are recounted in these pages.

DEE SMYTHE  
Kommetjie

## CHAPTER 1

# Charges Dropped: An Introduction to Attrition in South Africa

On a Friday and Saturday you have long queues of people  
reporting crimes against women and children and then  
on Monday you have a long queue of people  
wanting to withdraw these cases ...  
I am concerned as the Commissioner of Police  
about the conviction rate of these cases ...  
If I have a one percent conviction rate  
I have to be concerned about it.<sup>1</sup>

*Former Western Cape Provincial Police Commissioner Mzwandile Petros*

It is a warm Friday evening in Masiphumelele, a settlement in the far south of Cape Town, wedged between the Atlantic and Indian Oceans. On her way home from work Tandazwa Mpofu\* stops off for a quick drink at a shebeen, one of the tens of thousands of vibrant, informal, and often illegal, drinking establishments found across the country. She phones her sister to join her, but she's still at work. At the shebeen she takes a chair outside—it is summer, still light, and already getting hot and stuffy inside. A woman invites her to join their table. She introduces Tandazwa to a man she says is her father. An hour or so later, when Tandazwa says goodbye, they offer her a lift home. The car is distinctive: souped up in a backyard, painted red, with black racing car stripes down the sides. After dropping off his 'daughter' the man takes Tandazwa to a quiet road, where he rapes her at knifepoint and throws her out of the car. Naked, she finds her way to the house of a friend, who gives her clothes and takes her to the police station. She can identify the car and is certain she can identify the man who raped her. There were many other people at the shebeen who saw them together. She can identify the man's 'daughter'.

\* Not her real name.

One month later the only entry in the police docket, is a short summary of the facts, written by the detective, with the following phrase underlined in red: 'he bought beers for the victim ...' Nothing else has been done to pursue the investigation. The docket goes to the Detective Commander for inspection. Obviously angry he writes in the investigation diary:

1. Your investigation or the lack thereof comes down to severe negligence on your part.
2. This docket must receive the attention it deserves. Why was no crime kit completed?<sup>2</sup>
3. Do it NOW!

That same day the detective goes to the victim's house and obtains the following withdrawal statement from her:

I have spoken to the investigating officer about the case, but I cannot answer any of his questions. That is, who is the man who raped me, who was sitting at the table [in the shebeen], and also where it happened. I can therefore provide no information to take this investigation forward. I also told my mother this. I therefore feel like I don't want to continue with the matter.

The case is closed: 'withdrawn complainant'.

\* \* \*

Not every act of victimisation is prosecuted. We don't expect it to be. We expect that there will be a winnowing process, through which the cases that are worthy of prosecution will ultimately be tested in court. We assume that those will be the cases in which the evidence is strongest. We also accept that there will be victims who elect to withdraw their complaints and not to proceed, even if they have a strong case, but even more so if their case is weak. We accept that some perpetrators will never be punished for their misdeeds, despite the best efforts of the state to apprehend them. We expect victims to move on—emotionally we hope, but we are not surprised when they also move on physically, leaving the

place where they were violated and where they now feel so unsafe. When they fail to inform the police that they are leaving, and cannot therefore be traced, it is not entirely unexpected. After all, they have other things to think about. We even accept that some people will claim to have been victimised when this is not so, laying false complaints to further an ulterior motive or, perhaps, because they are mentally unsound. In other words, we accept that for a range of reasons attrition happens in the criminal justice system, so that not all reported cases are prosecuted and not all prosecuted cases result in conviction. But the view expressed by the provincial Police Commissioner, and the experience of Tandazwa Mpofu, reflect two very different perspectives on attrition. In both instances—the woman who withdraws her complaint on Monday morning because she has sobered up or reconciled with the perpetrator, and the woman who withdraws her complaint because of police incompetence and apathy—the official outcome written on the docket and captured in police statistics is the same: ‘withdrawn complainant’. But the locus of responsibility for that decision and the degree of agency exercised by victims differs markedly.

While attrition is to be expected in any functional criminal justice system, it occurs in an institutional context that is shot through with discretion. One scholar has gone as far as to suggest that ‘(w)hat we call the criminal justice “system” is nothing more than the sum total of a series of discretionary decisions by innumerable officials’.<sup>3</sup> The actions of criminal justice actors and the decisions they make are a crucial part of the attrition story. In most jurisdictions, the police decide whether to open a case, whether they will investigate it and how much effort they will put into accumulating evidence and finding the perpetrator. It is their choice (whether they recognise it as such or not) to encourage a complainant in her efforts to bring the perpetrator to justice or to acquiesce in her withdrawal from the justice system. The police decide whether a case should be referred to the prosecution. Prosecutors decide how to frame a particular set of facts as an offence—shaping a fit between what they can prove happened and a set of elements that defines the conduct as criminal. They decide whether a case has sufficient merit to be taken to court, what evidence will be brought, who will be heard. And a judge decides, ultimately, whether the state will provide redress. Throughout

this process, manifested at key decision points, cases leave the criminal justice system. In this way criminal justice actors have the power to select those whom the state will protect, who will be put on trial, and who will obtain justice.

**Victims** of sexual violence are particularly unlikely to find redress in the criminal justice system. Rape attrition studies have shown that a minority of rape victims lay a complaint with the police and only a very small percentage of those cases results in conviction.<sup>4</sup> The majority of cases leave the system long before any court date. Scholars studying attrition in rape cases generally explain this by pointing to the stereotypical views held by criminal justice actors about what constitutes a sexual offence and who can validly claim to have been victimised.<sup>5</sup> They argue that these beliefs have become scripted into criminal justice practice, with the result that the cases filtered out of the system are not those that are intrinsically weak, but rather those that offend the normative assumptions of decision-makers. There is empirical support for this contention. Studies conducted over the last 40 years have shown that the closer the fit between the facts of the rape reported and the decision-maker's conception of what constitutes 'rape' (as opposed to 'bad' or even 'normal' sex), the more likely it is that the case will proceed successfully through the system. On this account, 'violent' rapes committed by predatory 'strangers' against 'respectable' (for which read white, middle class, married or virginal) women, who are injured while resisting, have become the paradigm cases against which all rape reports are measured in the criminal justice system.<sup>6</sup>

Complainants who are perceived to have precipitated their own victimisation, whether through their conduct or their relationship to the perpetrator are at a particular disadvantage. Being drunk (or accepting a drink from the alleged perpetrator), hitch-hiking, flirting or selling sex, diminishes a complainant's credibility and the validity of her claim on the criminal justice system, even where there is evidence that the accompanying sexual acts were coerced. Despite evidence that intimate partner rapes are among the most violent manifestations of sexual violence, most Anglo-American jurisdictions have, until relatively recently, regarded marital rape as a contradiction in terms and provided little protection to women who are raped by their husbands.<sup>7</sup> The residual effects of centuries

of prejudice linger tenaciously in criminal justice canons of sexual violence, relentlessly reproducing unjust outcomes, at the same time as they produce our very conceptions of sex and sexuality. Cultural beliefs about women and sex and the notion that what women really want—what they find romantic or erotic—is to be overwhelmed by male sexual aggression, infuse ‘common sense’ social and legal opinion, often leaving victims of rape without recourse or protection. Numerous studies have unmasked examples of misogynist stereotyping within police ranks, with experts suggesting that the institutional character of policing, with its own peculiar set of norms and stereotypes—machismo, cynicism and scepticism being not the least of these—makes the police particularly unsuited to dealing with victims of sexual violence.<sup>8</sup>

The police tell a different story. At least, in South Africa they do. Theirs is a tale of uncooperative victims. It is the Police Commissioner’s indignant comment about long lines of complainants on a Friday and Saturday night waiting to report crimes of violence against women and equally long lines on a Monday morning wanting to withdraw their complaints. Police talk about complainants who cynically use the criminal justice system, fabricating or exaggerating rape complaints to further their own instrumental goals, of revenge or extortion mostly, or to explain away their sexual misdemeanours. The police argue that even when they are sympathetic and helpful, victims withdraw valid complaints in large numbers, refusing to cooperate in the investigation and prosecution of the aggressor. They say that an inordinate number of rape complaints received by them are false and suggest that in certain communities this has become a commonplace means of exacting revenge on male partners (past or present). Furthermore, substantial numbers of rape complainants withdraw charges once they or their families have received financial compensation from the perpetrator. And finally, to a lesser extent, although very much prevalent in specific jurisdictions, direct or indirect intimidation forces complainants to withdraw charges.

These police officers have been through many hours of sensitivity training. They can reel off the 10 biggest rape myths and they care about bringing rapists to justice, but they maintain that if complainants do not cooperate there is little that can be done to pursue the case. Their malcontent runs along the following lines: investigating rape complaints

is often a frustrating waste of time and the effort required to investigate those cases needs to be weighed against other urgent organisational pressures and priorities, particularly in a resource-constrained environment like South Africa.<sup>9</sup> They argue that South Africa is fighting a 'war on crime' and the police are the vanguard. If rape victims are not serious about their own cases they have only themselves to blame if they don't get justice. Some argue that complainants should not be allowed to withdraw their complaints at all and that where they insist on doing so, or recant, they should be charged with defeating the ends of justice. The overarching claim is that it is *complainants* and not criminal justice actors or actions that are responsible for the closure of **cases**.

This book explores these claims of police intransigence and victim recalcitrance by looking at some of the reasons for the low-visibility decisions that result in case attrition.<sup>10</sup> We know that attrition happens. I do not seek to show that this is so or to demonstrate, in quantitative terms, the extent of the problem. Others, most notably Rachel Jewkes, Lisa Vetten and their colleagues, have very competently documented the extent to which cases are filtered out of the system in Gauteng, South Africa.<sup>11</sup> Instead, I look in fine detail at how attrition operates and the exercise of police discretion in this regard. I do so by telling the stories of those reported rape cases that were not prosecuted, drawn from a sample of police dockets in eight jurisdictions, four urban (Ocean View, Fish Hoek, Simon's Town and Muizenberg) and four rural (Tugela Ferry, Greytown, Weenen and Muden).

Fish Hoek, Muizenberg, Ocean View and Simon's Town are all in the Cape Town Metropole and were all served at the time by the Steenberg Family Violence, Child Protection and Sexual Offences (FCS) Unit, based at Wynberg Police Station, some 15-25 kilometres from the four stations. Together these stations represent a discrete geographic region, the so-called South Peninsula, which stretches from the Atlantic to the Indian Ocean across the Silvermine Mountains and to Cape Point, at the far south-west corner of the African continent. The region covers a portion of the population that includes all ethnic populations in the Western Cape, with each police station serving a cross-section of the population. Within each jurisdiction there is a wide variance in living conditions and access to social goods. My previous experience of working at various police



stations around the country suggested that it was particularly important not to select the known 'bad apples' or police stations known to be particularly problematic in their approach to rape cases, although the urgency and immensity of the problems at those stations—along with the shock value of the findings—made them an appealing target (senior police officials constantly expressed surprise that I was researching 'normal' or 'ordinary' police stations). But many of the problems experienced at those police stations, such as serving large transient populations, dealing with extremely high levels of gang activity, inhuman living conditions, particularly high staff turnover and inordinately high levels of rape, constitute variables that might not be more broadly applicable to other stations. I did not want to present jurisdictions in crisis as the norm. Therefore, although I have not aimed for results that are generalisable, I did seek to explore the general investigation and management of rape cases, rather than to highlight problems that might only arise at particularly dysfunctional precincts.

In KwaZulu-Natal, my choice of police stations was similarly determined by the wish to focus on a discrete geographical area, but it was also dictated by ongoing research at the University of Cape Town's Centre for Law and Society (CLS). That research is seeking to understand the nature of vernacular dispute-management processes and the relationship of those processes to the criminal justice system. The initial part of the project was based at six sites in the Msinga area, so I selected police stations that served those sites and would complement the data on a range of social fabric crimes that CLS was already collecting. Tugela Ferry, Weenen, Muden and Greytown police stations are all served by an FCS Unit in Greytown. Again, the stations reflect an interesting cross-section of the population.

I also draw on interviews conducted with detectives, prosecutors and magistrates. The perspectives of rape victims on whether to report their victimisation to the police, and the experiences of those who did so, are incorporated through an analysis of client intake forms completed by Rape Crisis counsellors at the time that the victim sought counselling support. In this way I explore what it is that police expect of victims, the withdrawal of cases, and the 'problem' of false reporting, before asking what the system, in turn, offers victims and what it delivers. A more

detailed discussion of the research process can be found at the back of this book.

At its heart this book is concerned with the question of police discretion and how its exercise shapes the criminal justice response to rape in South Africa. Police exercise their discretion in dealing with sexual offences within the bounds of legal prescription—laws and regulations that explicitly provide for, or implicitly allow, actors to select from a range of possible decisions. But the decisions taken, and even the frameworks that regulate them, are infused with institutional and personal characterisations, shaped by conceptions of female sexuality embedded in a history of patriarchal practice. This discretion provides the social space in which legal actors produce and reproduce a gendered and racialised cultural logic of sexuality.<sup>12</sup> It is only in examining the exercise of discretion, and the police management of rape cases, that we can begin to develop an understanding of the complex ways in which police *practice* interacts with complainants' disengagement from the criminal justice process. The result is, almost inevitably, to raise further concerns about the handling of rape by the police, but I hope it also provides some insight into the choices exercised by complainants. And I hope that taking a different look at the problem can suggest new entry points for improving systemic responses and supporting victims.

### Attrition points and processes

Scholars identify five key attrition points in the criminal justice process.<sup>13</sup> The victim's decision to report being raped to the police is generally identified as the first and numerically most significant attrition point.<sup>14</sup> Wedged between the decision to report and the investigation is the moment in the process where police discretion is perhaps most hidden and therefore most subject to abuse. It is the point at which a report is made by the victim and the police 'decide' whether a docket will be opened and the case investigated. This is not a legally cognisable point of discretion and it is impossible to quantify the extent of attrition at this stage of the process, with most reports of victims being turned away from police stations coming through clients seen at Rape Crisis centres.<sup>15</sup> Once a docket has been opened, the investigation involves taking statements,

forensic examination, evidence-gathering and arrest or interviewing of suspects. It culminates in a decision to dispose of the case under any one of a number of categories that generally reflect the investigating officer's view on the veracity of the case, the strength of the evidence, and the arrest of or chances of arresting a suspect. Where a report has been determined to be true, a suspect caught (or identified), and sufficient evidence gathered, the case is referred for a decision by the prosecution. The final two attrition points are the decision to prosecute and (in some studies) the acquittal of the offender. The latter is the popular terrain of legal scholars, generally occurring in the public domain, or at least subject to public scrutiny and review. It is here, in particular in the pronouncements of judges, that scholars have gained insights into how the law sees women. While many of these judgments are shocking, one can at least debate their assumptions because the exercise of judicial discretion is performed publicly. Not so the exercise of police and prosecutorial discretion, which accounts for a far higher number of cases lost to the system.

These are not discrete nodes, although often the literature treats them as such. Kerstetter, for example, talks about the police decision to accept a case and the prosecutor's decision to initiate formal proceedings as the 'gateway to the criminal justice system'.<sup>16</sup> They are undoubtedly connected—both in the anticipation of what role-players at other stages will do and the impact that it has on victim decision-making. Attrition points are the moments at which disengagement by or from the criminal justice system becomes manifest. For that reason they are the analytical focus of attrition studies, but it is questionable whether this approach is ultimately of much assistance in understanding the *process* of attrition. Estimating how prevalent an offence is in the community and comparing that against reporting rates, counting up how many cases are disposed of by the police or the prosecution, and looking at conviction rates as a proportion of cases prosecuted, provide us with the evidence that attrition happens. In most cases these calculations show that the fall-off in numbers between those experiencing victimisation, reporting it to the police, having their 'day in court' and achieving a conviction is vast.

While most scholars would agree that attrition happens as a natural part of the criminal justice process, the reflection of this phenomenon as numbers and percentages is deeply disturbing to our sense of justice. As

such, the stark findings presented by a quantitative analysis, focused on attrition points, is particularly attractive as a basis for advocating criminal justice reform. At the same time, Keith Hawkins warns that this positivist approach can lead us to view legal decision-making as a mechanical exercise devoid of context:

Too strong an element of positivism tends to produce an oversimplified and monochrome picture of legal decision processes ... [T]o see legal decisions as guided and constrained solely by existing legal rules, whether they exist in the form of statutes, case law, or other influences discernible in the policy statement of legal bureaucracies, is to ignore the social, political, and economic contexts in which those decisions are made and the richness, subtlety, and complexity of all the processes involved.<sup>17</sup>

Despite the nomenclature of 'attrition points', attrition must therefore be understood as part of a highly contextualised *process*.<sup>18</sup>

The analytical emphasis on attrition *points* tends to encourage a view of attrition as deriving from a singular decision that is temporally isolated from the conduct of the case. It also tends to be attributive, ascribing responsibility for the decision to a specific person. This is reinforced by the identification of specific variables, classified in terms of their perceived appropriateness, that ostensibly inform the decision. 'Legal' variables are treated as acceptable factors on which to base decisions; 'extralegal' variables are not. The former are those elements set out in statute, which are legitimate, while the latter, which include value judgements, are seen as illegitimate. But this distinction elides the importance of credibility in the legal process.

It is arguably impossible to separate out police views on the seriousness of the offence, the evidence necessary to prove the case in court based on the legal definition of the proscribed conduct, the normative credibility of the complainant, and immediate administrative pressures. All operate in tandem, with lesser or greater validity and more or less authority. This doesn't mean that police do not make inappropriate decisions, or that these are indiscernible from those that are not. What it suggests is that, while seeking to identify variables associated with case disposition and

the theories of discretion that inform them may be useful in terms of giving us a broad insight into crude forms of discrimination, such as overt racial and gender bias, it tells us little about decision-making processes and the contexts within which they may happen.

### **Attrition in other crimes**

I have not considered attrition in other crime categories. It is likely that much that is of concern in rape cases will be of equal concern in respect of other offences.<sup>19</sup> I do not make those connections here and make no claim that rape is in all respects treated differently from other crimes. At the same time, as leading South African criminal law scholar, Jonathan Burchell, writes, '[t]he crime of rape is unique in its distrust of the story of the victim of the crime.'<sup>20</sup> And there are differences that should be noted. While attrition is prevalent across a number of crime categories, the reasons for this drop-off are different. In the case of robbery, for example, the main reason is that the perpetrator is never identified. In contrast, the identity of the perpetrator is often known in reported rape cases. Comparative studies have also found quantitative differences in attrition of rape cases, in relation to such factors as the likelihood of victim withdrawal, legal representation of the accused and the likelihood of a guilty plea.<sup>21</sup>

### **South African studies on rape and policing**

The earliest South African research on the experience of victims reporting rape to the police was conducted in 1996 and 1997 by Stanton, Lochrenberg and Mukasa.<sup>22</sup> Rape complainants' experiences with the police reflected deeply problematic attitudes and practices, leading to concerns about secondary victimisation and the quality of evidence collected. These included police refusing to allow women to lay charges; formulating the charge as indecent assault when the victim was raped; not allowing the complainant to give her statement in privacy; making the complainant repeat her statement numerous times or to numerous officers; not making arrests; and not providing information to the complainant. Stanton and her colleagues argued that police exhibited an attitude, informed largely by sexist stereotypes, that minimised the seriousness of rape complaints

and alienated complainants. A study published in the following year took these concerns further, to look at the progress of rape cases through the criminal justice system. Through a combination of survey data and police statistical information, researchers from CIETAfrica estimated that of a sample of 394 women who had been raped in the Southern Johannesburg Metropole, 272 (69 per cent) had reported the attack to the police. Seventeen of these reports (6 per cent) 'became rape cases'. One in 'roughly twenty' of the cases was lost in a manner that the victim considered fraudulent. Of the 17 cases opened, CIETAfrica estimated that five were referred for prosecution, with one conviction.<sup>23</sup> Despite some methodological limitations, the CIETAfrica study provided a powerful advocacy tool for criminal justice reformers and feminist activists concerned with the treatment of rape cases in the system.

In 2002 a report from the SAPS Crime Information Analysis Centre (CIAC) drew further attention to the performance of the criminal justice system in responding to the problem of sexual violence. It showed that of 52 975 rape cases reported nationally during that year, only 8 297 went to trial, with fewer than half of those cases resulting in a guilty verdict.<sup>24</sup> In the Western Cape it was reported that 347 guilty verdicts were returned out of 4 064 reported cases. Almost one third (32 per cent) of cases referred for prosecution were withdrawn in court. Coupled with the fact that 49 per cent of cases in the Western Cape were disposed of by the police, the Western Cape presented as the worst performing province in South Africa.

The SAPS have been particularly concerned with the problem of case withdrawal, which was the focus of another study by the CIAC.<sup>25</sup> The study was premised on the problem statement that 'the disposal of rape and attempted rape cases as withdrawn significantly contributes to the low number of cases referred to court and prosecuted', impacting further on conviction rates. Disquiet was expressed about uneven performance in this regard across different police jurisdictions. A random sample of 789 dockets (comprising 16.2 per cent of withdrawn cases) was therefore drawn from those policing areas in South Africa with the highest rates of rape and attempted rape reported during that year. The report lists the reasons for case withdrawal provided on case dockets, the vast majority of which reflect victim decisions to withdraw, and takes these at face value.

The assumption that withdrawals derive from the decisions made by victims in isolation from the conduct of the case by the investigating officer informs an approach that entirely ignores case management and focuses instead on the victim as the person responsible for case withdrawals.

A more detailed quantitative study, which was in many respects the genesis of this book, was conducted in 2003. That study evaluated the operation of a newly formed rape response intervention in Cape Town.<sup>26</sup> Led by the National Prosecuting Authority, the Thuthuzela Care Centres (TCC) aim to coordinate medical, police and prosecution responses to rape, and channel cases into specialised sexual offences courts. One aspect of the study looked at records on the throughput of cases at three designated police stations, attached to one TCC, where a total of 1 259 rapes were reported between January 2001 and May 2003. Only 127 (10 per cent) of those cases were prosecuted. The other 914 cases (90 per cent) were disposed of—almost invisibly it seemed to me—without coming to trial. While this steep drop-off was explained by the usual canards of victim non-cooperation and criminal justice misogyny, it was also apparent that differences between police stations in administrative practice and even the subjective assessment of data capturers working for the NPA, influenced how cases were designated.

The most recent South African study to address attrition was published in 2008. The study sampled 2 068 rape cases in the Gauteng Province and provides insights into the extent of attrition in that province. It found a conviction rate of only 4.1 per cent on charges of rape, with 45 per cent of cases closed by the police, the majority being attributable to a failure to trace the suspect.<sup>27</sup> The study's ambitious scope provides us with the first large-scale study of attrition in South Africa, which allows us to move beyond the question of whether attrition is happening, to a fine-grained analysis of complex social and institutional dynamics surrounding rape attrition.

### **'Real rape' and attrition**

The dominant view of attrition in rape cases treats it as uniformly problematic, emblematic of the criminal justice system's recalcitrance in dealing with rape victims and rape complaints. The fault is inevitably

located in the stereotypes held by criminal justice actors. Attrition is seen to 'rely on and reproduce ... old-fashioned and contested ideas about acceptable femininity'.<sup>28</sup> It 'presents problems other than low conviction rates. It both originates in and leads to the perpetuation of myths and differential treatment of rape cases as compared to all other crimes'.<sup>29</sup> There is ample evidence to support this view. Studies suggest that physical force, proof of penetration, promptness of reporting, the extent of suspect identification, injury to victim, circumstances of initial contact, the relationship of the victim and the accused, the use of a weapon(s), and whether any resistance was offered by the victim remain among the most relevant considerations in coming to a determination as to whether a rape case should proceed to trial. In particular, Susan Estrich's landmark book, *'Real Rape'*, has subjected to scathing critique the way in which police, prosecutors and judges have used some or all of the above factors to shape the construction of rape within the criminal justice system.<sup>30</sup> According to Estrich, the criminal justice system considers to be 'real rapes' those involving the use of a weapon, resulting in injury to the victim, committed by strangers, and taking place out of doors, in a neutral place.<sup>31</sup>

Zsuzsanna Adler's UK analysis supports Estrich's claims by showing that the success of a rape complaint could be consistently predicted on the basis of the victim's sexual inexperience, her respectability, the absence of consensual contact with the perpetrator prior to the rape, resistance and injury, early complaint and a lack of acquaintance with the accused. Remarkably, where all of these factors were present, conviction rates were 100 per cent.<sup>32</sup> More recently, Frazier and Haney have found that cases are more likely to be prosecuted when they involve 'more severe assaults (i.e. threats, penetration, injuries), more evidence (a witness) and strangers.'<sup>33</sup> Liz Kelly describes these studies as positing a 'real rape template'. She argues that conformity to this template is one of the strongest predictors of whether a case is likely to remain in the criminal justice system, because it not only informs the attitude of criminal justice agents towards the offence, but also the victim's self-conception of the assault as a rape and her belief that the police will see it that way. For Kelly 'template here means more than stereotypes, it is a framework or model that people create on the basis of past experience that they then



use to assess whether subsequent events fit.<sup>34</sup> Kelly moves beyond the descriptive project of showing that stereotypes exist to providing an explanation for why they come into play, illustrating the institutionalised nature of discriminatory practices within the criminal justice process.

A persuasive analysis of this type of discrimination comes from Ian Haney Lopez in the context of institutional racism. Lopez argues that such discrimination is best understood in terms of the sociological concepts of scripts and paths, which are based on 'unexamined background understandings'. Scripts are the habitual routines that organisational actors apply to everyday situations or, as Lopez phrases it, 'stock prescriptions of conventional action', based on common sense views of everyday life.<sup>35</sup> For example, police officers who personally condemn gender-based violence may not recognise a particular type of victim, or perpetrator, or fact pattern as falling within the scope of that condemnation, allowing criminal justice agents to draw on a store of subjective 'knowledge' against which rape complaints may be measured. These scripts are further informed by the imperatives of administrative efficiency<sup>36</sup> and the need to gather evidence, with the latter based in large measure on police assessments of whether the case will ultimately succeed at trial.<sup>37</sup> Lisa Frohmann's ethnographic study of prosecutorial discretion has similarly illustrated how the exercise of prosecutorial discretion on complainant credibility is mediated through a subjective 'repertoire of knowledge', which prosecutors use to construct a typical rape scenario and against which complaints are measured.<sup>38</sup> The view of attrition as founded in systemic practices is supported by Kerstetter, who has suggested that the police 'vet' potentially unsuccessful cases, based on a cost-benefit assessment founded in the need to manage workloads and other institutional pressures.<sup>39</sup> The result is that cases perceived to be weak are held back at each stage of the process. Scholars have long argued that the likelihood of conviction influences criminal justice actors who are processing cases 'upstream' of judicial decisions.<sup>40</sup> That is, knowing that certain cases are likely to result in conviction they are more likely to focus on those cases, rather than on cases that are non-conforming. What this means is that only a narrowly defined group of potentially convictable cases is adjudicated in court, reinforcing stereotypical perceptions in the courts of what amounts to 'real rape'.

## Rape in South Africa

As South Africa began its transition to democracy in the early 1990s, it saw a rapid increase in reported rapes and other violent crimes. Rape in South Africa increased from 27 056 reported cases in 1993 to a peak of 55 114 between April 2004 and March 2005, reflecting a prevalence rate that is among the highest reported anywhere in the world. In the press South Africa earned the distinction of 'rape capital of the world' and Cape Town the moniker of 'Rape Town'.<sup>41</sup> Victim surveys from the mid-nineties onwards show that the fear of being sexually victimised ranks at or near the top of most South African's concerns relating to crime.<sup>42</sup>

Although sexual violence, and crime more generally, has been typified as a product of South Africa's transition, the focus on post-apartheid crime figures may be misleading. In all likelihood, the rise in crime levels was already happening prior to 1994 and gathered momentum in the years that followed.<sup>43</sup> In the decade between 1983 and 1993, reported rapes almost doubled from 15 342 to 27 056.<sup>44</sup> Commentators were already expressing concern in the early nineties about soaring rates of gender-based violence, linking it to the pernicious effect of apartheid in destroying family structures and perverting masculinities in a context where men were simultaneously emasculated and militarised through acts of brutality and resistance.<sup>45</sup>

It is likely then that the increases seen during South Africa's transition stem from a combination of three factors: increased reporting, better record-keeping and actual increases in the prevalence of criminal offences as part of a longer term trend. Prior to South Africa's democratic transition, police resources were concentrated in white areas, with policing in black areas being predominantly targeted towards political control. Apartheid-era crime statistics are biased by underreporting, because the majority of South Africans had little faith in a 'justice' system that was at the same time being used to oppress them. Worse still, complainants ran the risk of being seen as colluding with security forces. When black women reported being raped to predominantly white police officers many were not taken seriously and their reports not recorded. Before 1993 marital rape was not a crime and would not have been included in any statistics either. Finally, under apartheid the territory that is today South Africa was divided into

a number of so-called independent ethnic homelands and self-governing territories, each with their own police force. Prior to 1994, South Africa had 11 different police forces, with widely varying competencies in the collection of crime statistics. Crimes reported in the 'independent homelands' were not included in national figures. Poor record-keeping therefore makes it impossible to even estimate pre-1994 levels of rape in those areas.<sup>46</sup>

Further complicating matters, until 2007, rape was defined in terms of the common law as 'unlawful and intentional sexual intercourse with a woman without her consent.'<sup>47</sup> Only women could be raped and only men could be perpetrators. The only act that constituted rape was vaginal-penile penetration. None of the thousands of cases of anal penetration and oral-genital violation, nor the cases where victims were penetrated using bottles, broomsticks and other objects, fell within this very narrow definition of 'rape'. This changed with the passage of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which codified the definition of rape to be gender-neutral and to include oral and anal penetration, as well as anal and vaginal penetration by means of objects. Section 3 of that Act now provides that: 'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.' The Act also provides for a range of other sexual offences, including sexual assault, and more forms of sexual violation are now included in police statistics. That said, by 2001 South Africa had the highest levels of *reported* rape in the world. The number of sexual offences has stayed consistently high, ranging between 63 818 and 70 514 over the past 10 years.<sup>48</sup>

Rape in South Africa has also emerged as a crime of extreme violence. Commentators liken the types of rape they see in South Africa to those perpetrated during armed conflict, in terms of the degradation, ritual humiliation and extent of injuries involved.<sup>49</sup> Studies at various sites have found multiple perpetrator involvement in between 25 per cent to 55 per cent of rapes.<sup>50</sup> Reflecting the extremity of the violence that accompanies rape, a recent national mortuary-based incidence study concluded that South Africa has a rape homicide rate of 3.65 per 100 000 women aged 14 years and older.<sup>51</sup> Data from the same study showed that in South Africa a woman is killed every six hours by an intimate partner.<sup>52</sup> The horror of rape in this context is compounded by HIV, with a national prevalence of

29.5 per cent recorded among women attending antenatal clinics in 2011.<sup>53</sup> Overall, the prevalence rate is estimated to be around 10 per cent of all South Africans, with the highest rates of infection (32.7 per cent) found among women below the age of 30.<sup>54</sup> Scholars have drawn a link between these high levels of HIV infection and the prevalence of coerced sex within that group.<sup>55</sup>

Rape in South Africa must be seen in the context of gender relations that are grafted into a history of racial and class oppression. Writing in South Africa under apartheid, Ramphele and Boonzaier pointed out that patriarchy was 'the one point of agreement between black and white men.' Gendered relationships, they wrote, were structured, shaped and defined by 'the exploitative system of racial discrimination, economic deprivation and the manipulation of 'tradition' as a means to legitimate male domination.'<sup>56</sup>

Despite the recognition that the impact of apartheid was profoundly gendered, and that one of the most pernicious ways in which it played out was in the violence(s) perpetrated against women, the problem was inevitably subsumed into the more pressing political agenda of ending white minority domination.<sup>57</sup> Women in South Africa had no choice but to 'engage multiple systems of domination simultaneously'—asserting themselves against both apartheid and 'patriarchal assumptions and structures within their own communities.'<sup>58</sup> While white women could, in theory, call on the criminal justice system, Kemp and her colleagues point out that black women were often forced into making the strategic choice to confine and contain disputes with black men in the face of a 'seemingly invincible nationalist party-state that was quick to exploit any sign of division in order to subjugate Black people even further'.<sup>59</sup> It should not be surprising, therefore, that there is a remarkable paucity of research into criminal justice responses to rape in South Africa prior to 1994. For the most part, the problem of sexual violence was either ignored or subsumed under the broader imperative of ending apartheid.

It was only after 1990 that feminist activists began to engage directly with discourses around women's rights and that violence against women found its way onto legislative and policy agendas.<sup>60</sup> And it was only during the late 1990s that consistent concerns began to be expressed about reporting and conviction rates for rape, and the treatment more generally

of rape victims within the criminal justice system. The end of apartheid and South Africa's transition to democracy provided the socio-political impetus for a substantial increase in civil society and government efforts to introduce socially progressive laws and policies.<sup>61</sup> In a large measure, for better or worse, these efforts came to be focused on the use of law. This is not surprising, given that the apartheid state was shaped and defined by a complex set of laws that dictated every aspect of our social lives. The law governed social and private spaces, creating a racialised reality, institutionalising a peculiar set of social norms, which legal and social activists sought to deinstitutionalise through the development of progressive rights-based legislation, more reflective of the social values to which they aspired. Almost inevitably, South Africans, who had experienced at first hand the power of law in engineering their own social realities, therefore came to focus an enormous amount of energy on developing progressive rights-based legislation and policies that reflected an idealised, egalitarian society.<sup>62</sup>

At the same time the opportunity arose for the first time in South Africa for gender activism to take shape within a sustained discourse around women's rights,<sup>63</sup> with the democratic South African government showing an increasing recognition of the need to prioritise women's issues. Women returning from exile during this time brought with them not only a broader world view that included experience gleaned from feminist mobilisation in other countries, but also the bitter knowledge of women's exclusion from political debates—and ultimately from power—in other post-liberation contexts.<sup>64</sup> Led by the ANC women's caucus they insisted on representation during the peace negotiations and in the writing of the Constitution, building alliances of women across party and ideological divides.<sup>65</sup> This activism ensured a strong and active women's caucus within South Africa's first democratic parliament. With rape and sexual violence becoming central to the South African public's consciousness of crime, gender activists entered into a critical engagement with government policy around violence against women and children, using the opportunity to push for the enactment of victim-centred legislation. Although, largely speaking, this did not translate into a coherent research agenda, what it did do was to underpin a strong social movement towards reforming and codifying South Africa's laws on gender-based violence.<sup>66</sup> The struggle to include

specific rights for women in South Africa's new Constitution, our history of legislatively mandated oppression, and the fact that many leading activists were lawyers by training put the emphasis of much feminist activism during the transition on law reform, while paying little attention at the time to the state's capacity to implement those reforms.

### **Why does attrition matter?**

In a transitional post-conflict country such as South Africa, the legitimacy of the criminal justice system as an institution providing recourse for wrongs done is critical in entrenching faith in and respect for the law as a social institution. Beall and her colleagues have described the South African context as one of 'fragile stability', which remains at threat from the social problems that are the legacy of apartheid.<sup>67</sup> Reports of people taking the law into their own hands to punish perpetrators alert us daily to the consequences that result when the police and courts are no longer seen as providing security or effective recourse for harms done.<sup>68</sup> Attrition matters because it reflects directly on the institutional capacity and commitment of the state to enforce its laws, in a context where another commentator warns that '[t]he frustration experienced by the criminal justice system and the significance of the escalating withdrawal rate raises important questions about the legitimacy of the system and its ability to function effectively'.<sup>69</sup> It follows that if reported cases are unlikely to be prosecuted, the deterrent value of state sanctions is largely negated and there is little incentive for victims to report crime. At least one writer contends on this basis that high attrition levels threaten to 'progressively decriminalise sexual offences'.<sup>70</sup>

The apparent failure of the criminal justice system to adequately deal with sexual violence, as evidenced by low reporting rates, poor throughput and consistently low conviction rates, has become a cipher for the system's apathy towards sexual violence and disregard for rape complainants. It is one of the most public illustrations of the state's thoroughgoing failure to adequately address violence against women. The vast majority of rape victims who have approached the criminal justice system in South Africa have not received justice or protection. It is in their cases that we see the fault line between a rhetorical commitment to addressing sexual violence

through constitutional and legal guarantees and the application of those laws and policies.

### **A note on terminology**

There is some debate as to whether the term 'victim' or 'survivor' is more appropriately used in referring to someone who has been sexually violated. This is ultimately a political choice. While recognising that at some point a victim may transition to being a survivor, it is my view that at the point where a case is reported, 'victim' is a more appropriate term, and I generally use it, along with 'complainant', depending on the context. Similarly, 'alleged perpetrator', 'accused' and 'suspect' are used interchangeably. Reflecting the gendered reality of rape, both in South African law as it stood until December 2007, and in the extent of women's sexual victimisation, victims are referred to throughout as 'she' and perpetrators as 'he'. A conceptual distinction is made between 'gang rapes,' as those in which there is more than one perpetrator and a known gang connection, and 'multiple perpetrator rapes'.

Children under the age of 16, which is the age of consent in South Africa, are referred to as 'children', while recognising that children are defined by the South African Constitution as those under the age of 18. The choice to use the age of 16 years as a cut-off in the docket analysis, in preference to 18, was made because of the specific legal consequences attaching to the former in the context of sexual offences.

Apartheid developed and entrenched a hierarchical taxonomy of racial classifications. Between 1960 and 1996, the categories of Black, Asian, Coloured and White were used, as set out in the Population Registration Act of 1950. South Africa's latest census uses the categories African/Black, Indian/Asian, Coloured and White.<sup>71</sup> These are also the categories used by the SAPS. As a South African, I am acutely aware of the many ways in which these labels have come to constitute entrenched political and social identities and of the potential for data qualified by race to be misused and misinterpreted. There is a balance to be struck that should elicit great anxiety in any scholar: on the one hand, not to fall into the easy essentialising classifications that are so much part of the air we breathe in South Africa; on the other hand, to do justice to the ways in which

vulnerability to sexual violence and the ability to demand recourse from state institutions is deeply racialised. I therefore use these classifications reluctantly and with care, only where I believe that it will improve understanding of the context, and then as a marker of socio-political and not biological identity.

\* \* \*

In the mid-1990s, the South African government responded to the pressing problem of sexual violence by making violence against women and children a strategic crime prevention and policing priority. Translation of this rhetorical commitment into effective programmatic interventions has never been fully achieved. Nonetheless, the commitment thereto has been constantly reiterated in law and policy, and through the courts. The stories contained in this book reflect evidence of both victim recalcitrance and systemic failures. They cannot be neatly parsed. A picture unfolds of attrition as deriving from the complex interaction of individual, structural and systemic factors. While it is likely that the factors identified in this study share similarities with other, more developed countries, it is also arguable that many of them—and the way in which they combine—are reflective of the social and institutional dynamics of a developing country and, even more specifically, of the transitional post-apartheid South African milieu. In the chapters that follow I describe the studies that inform this book, the legal response to rape, and provide some context on policing in South Africa. Thereafter I consider in detail what the studies tell us about false reporting, victim withdrawals, what victims expect of the system and what the system expects from them.

On the day in 2004 when Tandazwa Mpofu was raped, more than 150 other women reported being raped to the South African police,<sup>72</sup> a small percentage of the estimated 1 350 women who were raped that day and every other day in this country.<sup>73</sup> This book tells the story of some of those cases and how they were dealt with by the South African Police Service (SAPS). They are individual cases that provide insight into the nature of sexual violence in South Africa and the character of the police response, problematising the popular notion that the inability of criminal justice actors to respond adequately to sexual violence comes down largely to their reliance on myth and stereotype, and suggesting that, at least in this



particular context, much of the failure comes down to more generalised problems, including poor investigation skills and inadequate leadership and supervision. I argue that this skills deficit, and the demands it places on complainants, is particularly pernicious in a context of widespread poverty and social and economic vulnerability. What is more, it has the effect of transferring responsibility for seeking justice to complainants, who must constantly prove their commitment to the criminal justice process in order to be taken seriously.<sup>74</sup>

Simplistic accounts of uncooperative and prevaricating victims on the one hand, and unsympathetic misogynist cops on the other, do not take us any further towards understanding the dynamics of rape attrition. If the police are correct in their estimation, we are dealing with tens of thousands of deceitful women who are placing an intolerable strain on the system and its very limited resources. If women's rights activists are correct, the police remain deeply and irredeemably misogynist in culture and in practice. When nine out of ten reported cases are not prosecuted (and two out of three are not even referred to the prosecutor for a determination) we are faced with a massive systemic failure that needs to be understood. When the numbers are as substantial as they are in South Africa, the problem becomes urgent. Understanding this phenomenon is therefore at the centre of identifying ways to strengthen and develop police and civil society interventions, and to effect meaningful access to justice for victims of sexual offences.

## CHAPTER 2

### Paper Rich:

# Rape in South African Law & Practice

How a victim's case is dealt with in the criminal justice system is specified through a legal and regulatory framework. This framework is not definitive—it is only one aspect of the 'surrounding belt of restriction'<sup>75</sup> that circumscribes police and prosecutorial practice, and against which standards can be set for judging their exercise of discretion. This framework tapers down from broad, rights-based international and constitutional law commitments, given local meaning through their incorporation into laws and the judgments of our courts,<sup>76</sup> through the elements that define conduct as an offence and the adjectival rules that govern what evidence is collected and how these offences are prosecuted,<sup>77</sup> to detailed regulations and directives that determine how police functions are to be executed in responding to claims of criminal victimisation.<sup>78</sup> It provides the basis for determining whether a crime has been committed and how the state will respond. That this response is inflected (or as Kleinig suggests, perhaps more appropriately, 'infected')<sup>79</sup> by extra-legal normative judgments is well illustrated in the literature. Nonetheless, an understanding of the rules that underpin the police response provides us with a standard against which their conduct may be measured and a better understanding of the legal context in which they operate. In the pages that follow, I set out South Africa's international and constitutional commitments to addressing violence against women, the law pertaining to sexual offences, and the policies and regulations that govern police responses. These regulations are referenced repeatedly in the chapters that follow.

### International and Constitutional frameworks

South Africa's transition to democracy coincided with an international shift in the recognition of women's rights and, in particular, the prioritisation

of violence against women as a human rights issue to be dealt with in the public domain.<sup>80</sup> As South Africans were negotiating their transition to democracy, the 1993 World Conference on Human Rights in Vienna iterated for the first time the application of human rights guarantees to both the private and public domains, declaring violence against women a human rights violation. This was taken further in the 1994 United Nations Declaration on Violence Against Women, which set out state obligations to address the 'urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty and integrity and dignity of all human persons.'<sup>81</sup> The apartheid government signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 and South Africa's first democratic Parliament ratified it in December 1995.<sup>82</sup> In the ensuing years South Africa acceded to the CEDAW Optional Protocol<sup>83</sup> and became a state party to every other major human rights treaty. Regionally, South Africa has ratified the African Charter on Human and Peoples' Rights,<sup>84</sup> which obliges member states, through Article 18, to work towards the elimination of discrimination against women, and in 2004 it ratified the Optional Protocol on the Rights of Women in Africa, which came into effect in November 2005.<sup>85</sup> This is particularly relevant in setting out exacting due diligence standards for state parties in addressing violence against women. Article 4(2), in particular, requires state parties to take 'appropriate and effective measures ... [to]:

- (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public;
- (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;
- (c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence;
- (d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;
- (e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;

- (f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;
- (g) ...<sup>86</sup>
- (h) ...<sup>87</sup>
- (i) provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women;
- (j) ...<sup>88</sup>
- (k) ...<sup>89</sup>

Sub-regionally, the Southern African Development Community (SADC), of which South Africa is a member, issued a declaration on Gender and Development in 1997, requiring states to take 'urgent measures to prevent and deal with the increasing levels of violence against women and children'.<sup>90</sup> This commitment is further explicated in the 1998 SADC Addendum on the Prevention and Eradication of Violence Against Women,<sup>91</sup> which places far-reaching obligations on member states to intervene in the legal, social, economic, political and cultural context of violence against women. This includes:

Enacting laws such as sexual offences ... legislation making various forms of violence against women clearly defined crimes, and taking appropriate measures to impose penalties, punishment and other enforcement mechanisms for the prevention and eradication of violence against women and children.<sup>92</sup>

And,

Ensuring accessible, effective and responsive police, prosecutorial, health, social welfare and other services, and establishing specialised units to redress cases of violence against women and children.<sup>93</sup>

The impetus created by international developments in the early 90s came at a critical time when women in South Africa were lobbying for the inclusion of women's equality rights in the South African Constitution.<sup>94</sup>

Against staunch opposition from traditionalists on all sides, a coalition of women politicians and activists (the Women's National Coalition), representing a wide range of political groupings, was instrumental in including gender equality as a right under the Constitution. The equality provisions of the Constitution are progressive and far-reaching, explicitly protecting South Africans from both direct and indirect discrimination on the bases of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>95</sup> Directly challenging the artificial divide between public and private in the legal conception of human rights, the Constitution further guarantees the right to be free from all forms of violence, whether public or private in origin.<sup>96</sup> In this commitment it replicates the guarantees of the UN Declaration on the Elimination of Violence Against Women.<sup>97</sup>

The Constitution also imposes specific positive duties on the state to protect the interests of the country's residents, including the rights to dignity and privacy.<sup>98</sup> The positive nature of these state duties is described in section 7(2), which directs the state to 'respect, promote, protect and fulfil the rights in the Bill of Rights'.<sup>99</sup> Critically distinguishing it from jurisdictions like the United States, the South African Constitution requires our courts to consider international law when interpreting the Bill of Rights and empowers courts to consider decisions from other countries, thereby ensuring decisions that are likely to be consonant with and draw on the experiences of other rights-based jurisdictions.<sup>100</sup> Combrinck reminds us that the importance of this section of the Constitution lies not only in the fact that South African courts must consider international law, but that the courts' inquiries are not limited to treaties to which South Africa is party or to rules of customary international law that have been accepted by the courts.<sup>101</sup> The combined force of the constitutional right to be free from all forms of violence, the constitutional requirement to consider international law, and the obligations imposed by international human rights law creates, at least in theory, enormous scope in South Africa for the protection and development of women's rights to be free from violence. While these guarantees have had an impact on the legislative and policy environment, most commentators agree that interpersonal relations in South Africa continue to be marked by extreme gender

inequality.<sup>102</sup> We are paper rich and policy prolific. We are also a shining example of the complexity of applying international standards in the context of a developing country.

## Enforcing state obligations

In 2002 English scholar Liz Kelly voiced the opinion that, although little attention had been given to the implications of human rights principles for rape complainants, it was

... clear that states have responsibilities: to protect women from rape through effective statute law, investigation and prosecution processes; ensure that complainants are treated with dignity and respect throughout such processes; create conditions in which women's human rights are supported through education and prevention programmes.<sup>103</sup>

This 'due diligence' standard had been articulated a decade before by the United Nations CEDAW Committee, in General Recommendation 19 on Violence Against Women,<sup>104</sup> and has been further developed by successive UN Special Rapporteurs on Violence Against Women, Yakin Erturk and Rashida Manjoo.<sup>105</sup>

In South Africa, the Constitutional Court and lower courts have used South Africa's ratification of international instruments and the rights-based language of the Constitution to enforce state accountability for acts and omissions by the police that have caused gender-based harm. Acts for which the state has been held accountable include those where there has been direct harm (for example, the rape of a woman by uniformed police officers)<sup>106</sup> and indirect harms (including injuries suffered through the failure of police to retain a known sex-offender in custody while awaiting trial and failure to remove a firearm from a man who had previously pointed it at his wife and threatened to kill her).<sup>107</sup> In reaching these decisions South African courts have emphasised the need to comply with international standards relating to violence against women.

Of particular interest, for current purposes, is the case of *Carmichele v Minister of Safety and Security*.<sup>108</sup> The applicant in this case, Alix

Carmichele, was staying at a friend's home on the beach, where she was attacked by an intruder and sustained a number of serious injuries. The perpetrator had a previous conviction for indecent assault and a history of violent behaviour towards women. At the time of the attack on Carmichele, he was awaiting trial on charges of attempted murder and rape. Despite this, on the detective's recommendation, the prosecutor did not oppose bail and he was released on his own recognisance. On various occasions before the attack, the perpetrator had been seen loitering outside the house where Carmichele was staying. She and her friend had both approached the prosecutor and the police to report that he was acting suspiciously. They were told that there was nothing that the criminal justice authorities could do about it. Following the attack on her, Carmichele brought a claim for damages against the state. The key to her claim lay in proving that police and prosecution were under a legal duty to protect her, that they had negligently breached this duty and that, as a result, she had suffered damages. Neither the Cape High Court nor the Supreme Court of Appeal was prepared to acknowledge the existence of such a duty.<sup>109</sup> On appeal to the Constitutional Court, Carmichele argued that the police and prosecution owed her a duty to ensure enjoyment of her rights to dignity, privacy, freedom of movement and freedom and security of person.

It was also argued that the Constitution placed a particular duty on the state to protect women from sexual violence.<sup>110</sup> The Constitutional Court found that the Constitution did explicitly impose positive obligations on the police, based on section 215 of the Interim Constitution,<sup>111</sup> which set out the powers and functions of the SAPS as being: the prevention of crime; the investigation of any offence or alleged offence; the maintenance of law and order; and the preservation of the internal security of the Republic. This provision is largely replicated in section 5 of the Police Act,<sup>112</sup> as well as the 1996 Constitution. Furthermore, according to Judges Ackermann and Goldstone:

South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to

prevent the violation of those rights. The police are one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.<sup>113</sup>

On this basis the Constitutional Court referred the matter back to the trial court, which ultimately found for Carmichele.<sup>114</sup> This approach has been followed in a number of subsequent Supreme Court of Appeal judgments. In one of these cases the court had to contend with the failure of the police to revoke a firearm licence and remove the firearm of a man known to them to be violent.<sup>115</sup> It was argued that, as a direct result of this failure, the man, in a drunken rage, was able to shoot and kill his wife and daughter and to injure a neighbour, who had come to their assistance. By holding the police liable, the Court confirmed that where the rights to life, liberty and security of a person are at stake 'the state, represented by its officials, has a constitutional duty to protect them.'<sup>116</sup> The principle of state accountability for negligent acts and omissions by state agents, which in turn enables violence against women, has been entrenched through these cases in South African law. They have clearly established that the courts can intervene to ensure that the state takes positive steps to protect women against violence, and can impose liability on the state for failure to do so. While the full ambit of state obligations to protect, investigate, punish and compensate victims of sexual violence has not been fully explored in South African courts,<sup>117</sup> these cases provide a useful foundation upon which public interest litigation could be used to support state compliance with the duties imposed through international and domestic law.<sup>118</sup>

## Rape law in South Africa

The law on sexual offences was subject to reform over the course of the studies that inform this book. At the time of the Western Cape study, rape in South Africa was defined in terms of the common law as 'intentional and unlawful sexual intercourse with a woman without her consent'.<sup>119</sup> As such, the crime of rape was considered to have occurred only where there was penetration (however slight) of the victim's vagina by way of the perpetrator's penis.<sup>120</sup> It followed that only a man could perpetrate and



a woman be a victim of this offence. The state had to prove that there was an act of sexual intercourse, as well as the elements of *mens rea* (in the form of *dolus* or intention), unlawfulness and non-consent on the part of the alleged victim. This definition excluded same-sex violations and oral-genital violations and penetration of the vagina by objects other than the penis. These were defined in South African law as 'indecent assault', an offence which incorporated a range of acts from sexual fondling and 'flashing' to other assaults of a sexual nature such as anal penetration.<sup>121</sup> The impact of this definitional distinction in eliding the extent of violence, physical and psychological, associated with these other (and, by definition, 'lesser') unlawful sexual acts, was reinforced by various pieces of legislation enacted over the past decade to toughen up the state's response to rape. These include measures that limit the availability of bail for alleged rapists<sup>122</sup> and the imposition of minimum sentences for certain types of rape.<sup>123</sup> The exemption of husbands from prosecution for raping their wives was abolished in South Africa in 1993, by way of the Prevention of Family Violence Act.<sup>124</sup> The common law definition of rape was finally extended in December 2007 to include sexual penetration of both the penis and other objects into the victim's vagina, anus and mouth, as part of a far-reaching reform and codification of South Africa's laws on sexual offences.<sup>125</sup> The new definition is gender-neutral and radically broadens the scope of acts that fall within the definition of rape.<sup>126</sup> Although important from a principled position, in that it recognises other forms of violation and moves away from a heteronormative conception of sexual violation, for the most part these reforms have made little difference to police management of rape cases.

Schwikkard has described the rules of evidence pertaining to sexual offences in South Africa as the 'embodiment of misogyny', historically drawing little corrective attention from either the courts or the legislature.<sup>127</sup> Like most Anglo-American jurisdictions, South African courts have held tenaciously to the cautionary rule in evaluating the evidence of rape complainants.<sup>128</sup> The rule was only finally abolished, as it pertains to rape victims, in December 2007.<sup>129</sup> The cautionary rule continues to apply to child testimony, even though children are required to cross a competency threshold before they are allowed to testify and to single witnesses, which rape complainants often are.<sup>130</sup> Historically, weak rape-shield laws have

placed little restraint on cross-examination of the complainant regarding her previous sexual experiences.<sup>131</sup> Although amended by statute in 2007 to exclude prior sexual history evidence 'other than evidence relating to sexual experience or conduct in respect of the offence which is being tried' and then only with the leave of the court, it is likely that such evidence will continue to be considered admissible.<sup>132</sup> This is certainly the import of the high-profile case of *S v Zuma*,<sup>133</sup> involving a rape allegation against South Africa's then Deputy President, in which the court applied the provisions of the then draft Bill, and allowed far-reaching and damaging evidence regarding the victim's character to be led.<sup>134</sup> It is also likely that such cases, which drew widespread media attention, will have a greater impact on police perceptions of victim credibility—and therefore their practice in evaluating evidence—than the nuances of evidentiary rules enshrined in law.

### Statutory rape

Under South Africa's common law, children under the age of 12 are presumed to be incapable of consenting to sexual intercourse.<sup>135</sup> At the time of the Western Cape study, sexual intercourse with children was regulated under section 14 of the Sexual Offences Act of 1957,<sup>136</sup> which provided that it was unlawful for a man to have or attempt to have 'unlawful carnal intercourse' with a girl under the age of 16 or to commit an 'immoral or indecent act' with a girl or boy under the age of 19. Defences included that the girl was a prostitute, the person charged was under 21 years of age and charged with a first offence, and that the girl deceived the accused into believing she was older than 16.<sup>137</sup>

Section 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 repealed section 14 of the 1957 Sexual Offences Act and substituted it with sections 15 and 16 of the 2007 Act. Section 15 deals with sexual penetration, imposing the age limit of 16 for both boys and girls and introducing the gender-neutral offence of 'consensual sexual penetration with a child'.<sup>138</sup> In 2013 the Constitutional Court declared sections 15 and 16 invalid, insofar as they criminalise consensual sexual activity between children in the same age group who are 12 years or older, but younger than 16.<sup>139</sup> This decision

does not affect the criminal liability of adults who have consensual sexual intercourse with children under the age of 16.<sup>140</sup> In June 2015 a Bill was adopted by the National Assembly (still to be ratified by the National Council of Provinces) to decriminalise consensual sexual behaviour between adolescents.

## National policies

In 1996, under mounting pressure to address high levels of sexual victimisation, the government identified crimes against women and children as a strategic priority for addressing crime. The National Crime Prevention Strategy (NCPS), a far-reaching policy document published in that year, identified gender-based violence and crimes against children as one of seven policing priorities, recognising that 'violence against women exacts a high human cost' and suggesting the need for 'victim empowerment' as the central response.<sup>141</sup> This vague concept, along with the equally poorly articulated goal of 'crime prevention' set the tone for a policy that, although well intentioned, de-emphasised the investigative functions of the police, providing no directives to them as to how they should *respond* to sexual violence.

In 2000 the police developed a National Crime Combating Strategy (NCCS), which added more detail and specificity to the NCPS's strategic priorities. This policy document provided that crimes against women and children were to be dealt with by conformance with the regulatory framework provided by international conventions and the Domestic Violence Act (DVA);<sup>142</sup> 'vigorous' implementation of the DVA; the implementation of victim empowerment and support programmes; partnerships with relevant NGOs and parastatal institutions such as the National Network on Violence against Women, the Commission on Gender Equality and the South African Human Rights Commission; adopting best practices, including an inter-sectoral approach, with crisis centres and awareness programmes to be rolled out in priority areas; and strengthening specialised Family Violence, Child Protection and Sexual Offences (FCS) Units within the SAPS.

The SAPS Strategic Plan for 2005 to 2010 again listed crimes against women and children as one of four key strategic priorities, stating as its

purpose 'to reduce the incidence of crimes against women and children, as well as to ensure the proper investigation of sexual offences such as rape and indecent assault'.<sup>143</sup> Although the crimes were prioritised, the interventions identified by the NCCS were not used to elaborate programme outcomes and indicators in this document. In fact, it more or less restated the NCCS programme areas, providing that SAPS would address these crimes through various other state programmes and initiatives, ranging from a provincial attempt to foster interdepartmental cooperation in the prevention and investigation of rape, to broader victim empowerment and crime prevention initiatives. Absolutely no reference was made to improving investigations or how a 'proper investigation' was to be achieved. Even the sub-heading providing for 'reactive measures' (being 'the steps taken by the investigating officer on receiving a sexual offences case') provided only for 'professional victim assistance', which is defined as 'the treatment of victims, providing information on procedures followed by the SAPS and the Criminal Justice System, and referral of victims to support services'.<sup>144</sup>

The 2010 to 2014 Strategic Plan articulates a commitment to 'revamping' the criminal justice system to be 'integrated, modernised, properly resourced and well-managed', with one of the focus areas being to 'intensify efforts to combat crimes against women and children and the promotion of the empowerment of victims of crime'.<sup>145</sup> The linking of police responses to violence against women and the 'empowerment' of victims has interesting resonances in police practices that have come to increasingly shift responsibility to complainants.

The lack of a coherent SAPS strategy for dealing with rape reflects a deep institutional ambivalence about the ability of the police to respond to what they see as a 'social fabric crime'. This view is nowhere more apparent than in chapters on 'Detective Services' in the SAPS Annual Reports. Over a number of years the subcategory of *Sexual and Violent Crimes Against Women and Children* has contained a paragraph reminding readers that the role of the SAPS 'in preventing these crimes ... is very limited, because they occur mostly within a specific social environment (such as the family) to which the police do not have ready access.' Instead the authors note that '... the FCS Units play an important role in educating the public. Their primary goal is to inform the public of the existence of

these crimes, and the role of the public in preventing and combating these crimes'.<sup>146</sup>

Thus the special investigation unit tasked with managing sexual offences cases is reduced, at least in its rhetorical conception, to 'giving talks to create an awareness of this issue at schools, universities, youth and church organisations' and the failure to prosecute significant numbers of these cases ascribed to their 'private' nature—and by extension to the victims who will not support the public process of prosecution.<sup>147</sup> Commenting on detection rates for crimes against women and children, the most recent SAPS Annual Report again emphasises that offences against women and children 'often occur in the domestic/family environment'.<sup>148</sup> At the same time, there have been major shifts between the first and second studies reflected in this book, with a recent recognition by SAPS leadership of the need to improve detection services and the articulation of a strategy to increase the number of detectives overall and to ensure the reintroduction of specialised Family Violence, Child Protection and Sexual Offences (FCS) investigation units at all police stations.<sup>149</sup> A number of other policies have been put in place to make the criminal justice process more responsive to the needs and experiences of rape victims. The implementation of practical, systemic interventions specifically focused on victims has included the establishment of designated sexual offences courts, 'one-stop' multi-service Thuthuzela Care Centres, which provide for co-operation between police, prosecution and health services, and workflow protocols to guide the management and disposition of cases between state agencies.<sup>150</sup>

### **National instructions on sexual offences**

Legislative and policy priorities developed by national government are given effect at a station level through the National Instructions and Standing Orders issued by the National Police Commissioner in terms of the South African Police Service Act.<sup>151</sup> Two of these regulations are relevant here: The National Instruction 22/1998: Sexual Offences: Support to Victims and Crucial Aspects of the Investigation; and its successor, National Instruction 3/2008 Sexual Offences; and the Standing Order (G) 325: Closing of Case Dockets (issued 21 October 1993).

The National Instructions on Sexual Offences provide detailed guidelines for investigating rape cases and for the treatment of rape victims. Where relevant these are extensively quoted in the chapters that follow, to contextualise the findings. The Instructions specify what must be done when a sexual offence is first reported to the SAPS: ensuring that the victim is removed from any immediate danger, arranging for medical assistance, and obtaining a description of the suspect (which should be relayed immediately to the despatcher).<sup>152</sup> This is done through the community service centre at the police station. The person receiving the complaint must also immediately notify a detective, who must take charge of the investigation. Instructions are provided to the first police member on the scene on obtaining basic information from the victim, opening a docket and safeguarding the crime scene until the detective arrives.<sup>153</sup> The Instructions note that there are 'three crime scenes': the victim herself, the alleged perpetrator and the place where the incident took place,<sup>154</sup> but focus predominantly on the victim, going into some detail (for example, if the victim uses the bathroom she must be advised to retain any sanitary material used; liquid must not be offered to the victim if she has been forced to have oral sex; the victim should not wash herself or change her clothing; she should be removed from the crime scene and kept away from the suspect to prevent contamination of evidence). There is no such detail in respect of the place. The Instruction states only that nothing should be touched or removed until the detective arrives.

Section 9 covers the role of the investigating officer, providing that he or she should take charge of the investigation; ensure the safety of child victims; obtain information from the victim, in the form of a preliminary statement (taken in private) followed by an in-depth statement 'as soon as the victim has recuperated sufficiently from the ordeal'; keep the victim informed of the progress of the investigation, with specific reference to arrest, bail and dates of court appearances, with all interactions noted in the investigation diary; provide the victim with the investigating officer's contact details; and submit a statement with regard to the crime scene.

Further specific guidelines are provided for taking the victim's in-depth statement, including when (24-36 hours), where (a room with a relaxed, private atmosphere and few distractions) and how to handle discussions about intimate details. It states that the victim's statement must be

'comprehensive' and that the victim must be told ('with great sensitivity') that anything she may have done that might put her 'in a bad light when cross-examined' should be declared. Illustrative examples provided are that the victim consumed alcohol or drugs, and that 'the victim had originally found the accused attractive and allowed the accused to kiss him or her'. It does note that '[t]he fact that the victim acted in this way does not mean that permission was given for the sexual offence to be committed' and emphasises that '[t]he fact that the victim states everything in his or her statement, even information that will reflect negatively on the victim, will enhance the credibility of the victim.'<sup>155</sup> Other enumerated duties placed on detectives are to: complete the necessary paperwork for the medical examination; provide the doctor with a J88 form (on which they will detail the findings of the medical examination) and a crime kit; ensure that all the necessary forensic samples are taken and properly recorded; find out whether the victim had sex with anyone else less than 72 hours before the rape and arrange for samples from these partners; brief the doctor before the medical examination; mark the victim's samples and forward them to the Forensic Science Laboratory; take the suspect for a medical examination, provide all the necessary paperwork and forward the suspect's samples to the Forensic Science Laboratory; ensure the integrity of the evidential chain linking the victim, the crime scene and the suspect; handle applications for HIV testing of the alleged offender; arrange an identification parade in consultation with the prosecutor and explain its purpose to the victim; prepare the victim for court; ensure that the case docket is supplied to the prosecutor timeously to prevent delays; take the victim to court for pre-trial consultation with the prosecutor; give the victim her statements to read through again on the day of the trial; provide reassurance and explain the court proceedings, including the possibility of delays, and encourage her to 'press ahead with the case'.

An entire section is dedicated to victim after-care.<sup>156</sup> The Instruction notes the traumatic nature of a sexual offence and the need for counselling. It places an obligation on the Station Commissioner to ensure that a list of relevant services is kept at the police station. Where there are no services provided by government or non-governmental organisations in the area, the Instruction goes as far as to require him or her to approach religious or community leaders to volunteer or to initiate the establishment of such

facilities in cooperation with other relevant government departments. The victim is to be informed of these services and 'if possible' assisted in accessing them.

The National Instructions emphasise that the police have a duty to ensure that children and other vulnerable victims are protected.<sup>157</sup> Where sexual violence occurs within a domestic context, the victim must be informed of her right to obtain a domestic violence protection order and/or to lodge a criminal complaint. This is a civil interdict process provided for in the Domestic Violence Act.<sup>158</sup> If the victim is a child, the FCS Unit must be contacted. Where there are grounds for believing that it would be in the best interests of the child to be removed to a place of safety, the relevant provisions of the Children's Act<sup>159</sup> must be applied. In respect of mentally disabled victims, National Instruction 3/2008 specifies that 'if the investigating officer encounters difficulty when dealing with a mentally disabled person, the matter must be discussed with Legal Services as the procedure may necessitate an urgent application to the High Court'.<sup>160</sup> What constitutes a 'difficulty' is not specified in the Instruction.

Deviation from the Instruction is allowed only where there are 'compelling reasons' to do so and is subject to disciplinary action. While the 2008 National Instruction largely mirrors, albeit with greater clarity and specificity, the contents of the 1998 Instruction, a critical addition in 2008 is a section on the discontinuation of an investigation.<sup>161</sup> This requires that the Standing Order on the Closing of Dockets (discussed below) be 'strictly adhered to' when closing a docket, providing that only a senior officer (with the rank of Captain or higher) may authorise the closure of a sexual offences case. Specific positive duties are added in respect of cases in which it is alleged that the complainant or suspect cannot be traced. Here the supervising officer 'must satisfy himself or herself that the investigating officer has made every effort to trace' the person and give 'clear instructions' on the steps to be taken if they are not satisfied that this has been done.<sup>162</sup>

National instructions are critical in order to standardise the processing and management of cases: they reflect the official position of police leadership and if properly implemented can shift systemic practices and established 'working rules'. But this requires enforcement.<sup>163</sup>



## **Standing Order (General) 325: Closing of case dockets**

Standing Orders dictate how cases may be closed by the police. At one level they provide an administrative guide which facilitates the filing of cases in a reasonably ordered fashion. At another level they reflect a normative commitment to ensuring that cases are well investigated, prosecuted where possible, and closed only when there are sufficient grounds for believing that the case cannot or should not proceed. Specific categories provided for under Standing Order (General) 325 on the Closing of Dockets<sup>164</sup> are described below.

### **WITHDRAWN**

This category applies where an offence has been reported and there is sufficient evidence that the accused has committed it. It pertains to two instances: (1) where the police 'consider a prosecution undesirable' the docket must be sent to the public prosecutor and, if the prosecutor declines to prosecute, may then be closed as 'withdrawn';<sup>165</sup> and (2) where the complainant requests the charges to be withdrawn. This sub-category applies only to cases 'of no consequence' and '... shall not be permitted in a serious case, or in any other case if the circumstances are such that, in the interests of public justice, the charge should be proceeded with'.<sup>166</sup> The complainant must request the withdrawal in writing, providing reasons for this request. The Standing Order is very specific that 'on no account should the Police suggest to a complainant that she should withdraw a charge.'<sup>167</sup>

### **UNDETECTED**

A case may be closed as 'undetected' when it is clear that the offence was actually committed but (a) the investigation ... has failed to disclose the offender; (b) the accused cannot be traced; or (c) the complainant cannot later be traced.<sup>168</sup> If a warrant has been issued for the arrest of a known suspect, the case should be closed as 'undetected—warrant issued' and a date for further action on the case endorsed on the docket. The decision whether to persist with an arrest warrant is based on whether or not the case is likely to succeed in court.<sup>169</sup> Where the complainant cannot be

traced, the case should be closed as 'undetected—complainant not traced' and substantiated through affidavits by witnesses, such as neighbours. The Standing Orders specifically state that cases may not be closed as 'withdrawn' where they would otherwise have been closed as 'undetected'.<sup>170</sup> In other words, where the police are not able to resolve a case they are barred from obtaining a withdrawal statement from the victim.

#### UNFOUNDED

A case may be closed as 'unfounded' only when the investigation clearly discloses that an offence has not been committed. Examples given in the Standing Orders are when allegedly stolen property is found to have been misplaced, a mistake made in counting stock, or the investigation discloses some other explanation. Bizarrely, the specific example given here is as follows: 'from a carcass found or other indications, it is clear that stock reported stolen has died as a result of disease, starvation or an accident, drowning or was killed by a wild animal'. It is unclear how urban police officers are supposed to reason from this narrow example to the complex cases involving human victims that they deal with on a daily basis.

#### RESPONSIBILITY

The Standing Order also imposes responsibility on the supervising officer who closes the docket 'for ensuring that the case was properly investigated and that all possible sources of information have been explored.' It provides specifically that 'any neglect to do so will be viewed in a very serious light. Neglect with the reckless disregard of the consequences may possibly be regarded as defeating the ends of justice. The fact that a ... Public Prosecutor has declined to prosecute in no way absolves from responsibility the officer ... [for] closing a partially investigated case'.<sup>171</sup> These provisions are important to keep in mind in the context of the cases we see in this book that were closed by police.

## Prosecution

While I am particularly interested in the role of police in attrition, a substantial number of cases were referred to prosecutors for a final determination. It is therefore useful to briefly point out the statutory basis

of their authority, which can be found in section 6 of the Criminal Procedure Act 51 of 1977:

**Power to withdraw charge or stop prosecution**

An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution ... may—

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge...

The National Prosecuting Authority's Policy on Prosecutions<sup>172</sup> expands on the context in which these decisions may be made:

In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.<sup>173</sup>

In reality, very few of the cases I saw mapped neatly onto the criteria for the categories set out in either the Standing Orders or the Criminal Procedure Act. This confirms previous research which has found considerable variance in case disposition from station to station and court to court, even within the same magistrates court jurisdiction.<sup>174</sup> A number of cases were closed *nolle prosequi* (decline to prosecute) by the National Prosecuting Authority (NPA) based, for example, on a complainant withdrawal statement. Many more were simply closed by the police on exactly the same basis, without recourse to the prosecution. It was difficult to discern a pattern to these variations. The *nolle prosequi* and 'withdrawn by prosecutor' categories do give us an indication, though, of the extent to which prosecutors may have had some involvement in determining the

disposition of these cases. Overall, however, data giving the official disposition of cases, as stated on the docket, should be read with caution.

Artz, Smythe and Leggett have suggested that such variations have little to do with the content of the dockets and more to do with station-specific disposition practices.<sup>175</sup> Their research drew attention to two police stations that neatly reflected this variation. At Station A 33 per cent of cases were closed as undetected, 16 per cent due to the complainant, 21 per cent were withdrawn in court and 16 per cent filed *nolle prosequi*. Conversely, at Station B only 4 per cent were filed undetected, 7 per cent due to the complainant, 8 per cent were withdrawn in court and a massive 61 per cent filed *nolle prosequi*. It was suggested that the practice at Station B was to refer all undetected cases to the prosecution for a final determination, with the result that instead of being classified as undetected, they were disposed of *nolle prosequi*. This practice was not followed at Station A, but the net effect in terms of attrition was much the same.<sup>176</sup>

This variability has a number of implications. The first is that stated case disposition categories may be an unreliable indicator of the actual reasons for filing a case. The second is that case disposition categories are an unreliable indicator of where and how the decision was made not to take the case further, as the prosecutor may simply be 'rubber-stamping' a decision already taken by the police, rather than applying his or her mind to the merits of a case, which the police believed, after investigation, was ready to be considered for prosecution.<sup>177</sup>

## Police dockets

Mark Cooney observes that 'while scholars have analysed the second phase of fact-finding—evaluation of evidence—they have rarely explored the prior stage—the production of evidence', which he defines as 'the effort legal officials put into generating evidence through investigation of facts'.<sup>178</sup> South African police stations use the centralised Crime Administration System (CAS), a nationally standardised computer system, to collect docket statistics. Only dockets which are officially opened are reflected on this system, which means that it is not possible to ascertain how many reports were made to the police where no complaint was recorded.<sup>179</sup> For those that are opened, the most effective way to access

information on the circumstances of the offence, the collection of evidence and the reasons for case withdrawal is through police dockets. While bearing in mind Kelly's admonition that '[c]ase file records and other attrition data cannot discriminate between attitudes of detectives that are supportive or cynically dismissive',<sup>180</sup> my previous experience with case docket analysis had led me to believe that insight into these attitudes could be usefully gleaned from entries made by detectives in the investigation diary, which forms part of the docket. Dockets also provide some understanding of the nature of the crime, the victim and the perpetrator (including location, time, place and day of the crime, the presence of weapons and injuries and whether the perpetrator had prior convictions), levels of investigation and supervision, and reflect how long the case was active. An important benefit of case file analysis is that it largely obviates the need for engaging with—and so potentially re-traumatising—victims about their experience of policing.<sup>181</sup> And, without attempting to second-guess the investigation, dockets can provide some insight into the competency and attitudes of the investigating officer. This is really the only place where a totality of the events as they pertain to the victim, perpetrator and criminal justice system can be gleaned in one relatively accessible form. These artefacts of what *is* recorded by state systems provide important insights into the nature of violence that comes to public attention and the state's response thereto. Stanko argues in this regard that,

When we study the public records, we can hold officials to account for addressing in a holistic way the violence they do know about from their own information. We should be asking how those who come to the attention of officials will be supported, helped, or provided with competent, sympathetic treatment. And we should have a way of documenting why such support did not lead to a successful intervention.<sup>182</sup>

These are critical questions that go to the heart of state accountability to victims of sexual offences.

## WHAT IS IN A DOCKET?

Case dockets are cardboard files, folded three ways like a pamphlet, which are kept by the police to document a case under investigation and subsequently transferred to court. Each docket contains three sections—A, B and C. The front cover contains the file number for the investigation, the case number (if it has gone to court), the name of the detective and police station, the dates of court appearances, the names of the complainant and accused, and details of the charge. It also contains, where a case has been closed, the official disposition category and date on which it was filed. If a suspect has been arrested, the back inside cover makes provision for identifying information, including fingerprints.

Section A generally contains the complainant's statement; any witness statements; the suspect's statement; medical reports; and any additional evidence. The complainant's statement is typically handwritten by the police officer taking the statement. It leads with the name, sex, employment status and contact details of the complainant and contains details of the alleged offence. There is also a standard form containing the same basic demographic data. This form was not present in all the dockets I looked at and was generally not fully completed.

Complainants are required to read through their statement and to affirm its correctness. The statement is then signed by the complainant. A police officer, acting in his or her capacity as a Commissioner of Oaths, signs to attest to its accuracy. In many cases the only way to tell when a statement was taken is on the basis of the date and time that it is commissioned. Witness statements are taken in exactly the same manner. The suspect's statement is made at the time of his arrest. It is therefore sometimes referred to as an 'arrest statement' or 'warning statement', on the basis that the suspect also attests to having been warned of his due process rights at the time of the arrest. While a typical entry in the suspect's statement reads 'I will disclose my defence in court', a surprising number contained detailed elucidations of their defence, most often averring that sex was consensual.

Reports of the medical examination are completed by an examining doctor on a prescribed form, referred to by its official form number as 'the J88'. This form makes provision for a clinical history, details of the injuries sustained, requiring specific attention to genital injuries, and

calls for a clinical conclusion. While these examinations have historically been done by district surgeons in state employ, they are now more typically done by doctors employed at the closest state hospital. This was the case for all the dockets in the study containing J88s. Only two dockets contained photographs. One documented the crime scene and the other the extensive injuries of a woman, who had been stabbed multiple times and left for dead.

Section B contains correspondence, including requests for the forensic examination of semen and blood samples; correspondence between the detective and the complainant; and a standard form indicating the detective's reasons for opposing bail or not. Typically indications of gang affiliation or prior violent offences can be found in this document. The SAPS69, which sets out the nature of and sentence imposed for any prior convictions is also contained in Section B.

Section C is the 'investigation diary'. It is kept in diary format, with the detective noting any efforts in the investigation of the case, leads followed up, and progress (or lack thereof). The salient facts of the offence are typically transcribed by the detective into the investigation diary, constituting the first entry. Detectives indicated that after transcribing this information they seldom referred back to the complainant's statement—a problematic practice, given that the complainant's statement was truncated into around five to ten lines in the investigation diary, necessarily excluding facts that could prove relevant. The investigation diary has a surprisingly 'Dear Diary' quality, with investigating officers freely expressing their opinions on the merits of the case and their frustrations with complainants. This proved to be a rich source of data.

The investigation diary also contains interactions between the detective and the supervising officer or the prosecutor. The supervising officer typically checks the docket on a monthly basis. Entries made by supervisors consisted mostly of instructions to follow up leads, obtain statements and communicate with the complainant. This is a critical aspect of the investigation process and it was heartening to see that the majority of dockets contained these kinds of entries. However, the lack of attention to these instructions and often cynical circumvention of them was an important insight reflected in this book. Instructions and comments from the prosecutor are also contained in this part of the docket.

## LIMITATION OF DOCKETS

For all the benefits of dockets, they are also often incomplete, handwriting can be illegible and crucial information may be omitted.<sup>183</sup> These deficiencies are compounded in South Africa by the fact that investigating officers are required to write in English or Afrikaans, which may not be their first language, or that of the victim. A number of the documents in the dockets were written in Afrikaans, requiring that I translate them into English. All translations were checked for accuracy, but remain translations, subject to the vagaries of language and interpretation. Obvious discrepancies between the reason given for closing the docket and the reasons that emerge from analysis of the information contained within the docket makes constructing a 'profile' of these dockets impossible, particularly using official statistics and disposition categories. Problems with the inaccuracy of case disposition categories raise an important red flag for large quantitative attrition studies that assume the docket status captured in police statistics to necessarily be the reason why the case was closed.

Generally speaking, the information contained in the dockets tells us little about the impact of the crime on the victim or the motivation behind the rape. While it tells us the reason given by the victim to the police for withdrawing the case, it tells us little about her state of mind at the time or about how she perceived the service she received. It does not even necessarily tell us what her *real* reasons were—because sometimes we say what we think others want us to say or what we have to say, to get out of a situation in which we feel trapped. At best we can seek to understand the reasons given by both complainants and the police for closing rape cases and the contexts—particularly as they pertain to the nature of the crime—in which these reasons are given and accepted.<sup>184</sup>

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South Africa is paper rich when it comes to dealing with sexual violence. It has ratified the leading international and regional human rights treaties and instruments seeking to address these problems, and enshrined a constitutional protection against privately perpetrated violence, applied and enforced through decisions of our highest courts. At a policy level, the South African government and the police service have identified



violence against women as a critical policing priority and enacted institutional safeguards against inappropriate responses to rape complainants through National Instructions and Standing Orders. The problem is not with law in the books but with criminal justice practice. It is in the practical realities of everyday policing and in the attendant discretionary choices, that police responses to rape crumble, reinforcing the pretext that rape is, essentially, a crime that is impervious to policing.

## CHAPTER 3

# The South African Police Service & the Communities they Police

### The South African Police

In the short period that has passed since the end of apartheid and the advent of majority rule, the South African police have undergone a process of massive institutional transformation and restructuring at all levels, described by one commentator as a situation of 'multi-dimensional turbulence'.<sup>185</sup> This is in many respects typical of post-conflict and transitional societies.<sup>186</sup> Throughout its existence, the South African Police (SAP) had been a highly militarised force primarily serving the political purpose of enforcing white minority rule—first that of the British colonial regime and later of the Afrikaner-Nationalist apartheid state. They were very visible in canary-yellow armoured vehicles, and brutal in their tactics. For many South Africans and others concerned with South Africa at the time it was said that '... the image of white policemen attacking black protestors—with batons, guns or armoured vehicles—epitomises the repression associated with apartheid'.<sup>187</sup> During this time, the criminal victimisation of the majority of the population, particularly those living in deeply rural areas and the poverty and squalor of urban townships, was cynically ignored while police energy went into policing the 'petty' crimes that undergirded grand notions of 'separate development'. Crimes created by apartheid, such as the criminalisation of interracial sexual relations,<sup>188</sup> where people lived<sup>189</sup> and worked,<sup>190</sup> what transport systems they used,<sup>191</sup> what they said about the government and how they protested inequity,<sup>192</sup> were effectively policed. The response to 'ordinary' crimes—murder, rape, assault, robbery and theft—was selective and reactive. Policing resources were, for the most part, applied to protecting whites from crime and maintaining state security, under an apparently constant threat from internal resistance and a 'communist onslaught' gathering at its borders.<sup>193</sup> As a

result, counter-insurgency training formed an integral part of the police curriculum and all new recruits were deployed into combat alongside the South African army.<sup>194</sup> The brutal tactics honed on the battlefield inevitably found their way home and into the maintenance of 'law and order', reinforcing an already highly militarised institutional culture within the police.<sup>195</sup> The continuities of these police practices have become increasingly apparent in the policing of public unrest in recent years, as evidenced most dramatically in the shooting of protesting mineworkers by police at Marikana.<sup>196</sup>

Detective work in this environment, on the admission of Louis Eloff, Deputy National Commissioner and an apartheid-era police general, became focused on the use of 'intrusive techniques and unorthodox (sometimes inhuman) methods to obtain or extract information'.<sup>197</sup> The focus of these investigatory techniques was on obtaining confessions, inevitably under coercive circumstances, rather than traditional investigation and evidence-gathering methods. The same police general explains that police practice 'became routinely coercive in nature and not concerned with legitimacy, transparency, accountability, participation, mutual respect and fundamental rights'.<sup>198</sup> The deeply chauvinist tenets of Christian-Nationalist ideology, to which state institutions were structurally bound after the 1948 victory of the National Party, also reinforced the overwhelmingly masculinist and patriarchal orientation of the police. Police work was men's work, and as late as 1992 only 5 per cent of the police force was female.<sup>199</sup>

The state's response to sexual violence was predictably variable under these circumstances. Although the offence of 'rape' was defined in race-neutral terms under the common law, the reality was that all police files clearly referenced the race of the parties: 'rape of black man on white woman'; 'rape of Coloured man on Coloured woman'; and so on.<sup>200</sup> For many black women living in South Africa, reporting a sexual offence was not an option, particularly when the rape was perpetrated by a man whom she knew. Nobody wanted to draw the attention of the police, even as a complainant. It was extremely unlikely in any event that the police would investigate the report, and even approaching them amounted to 'selling out' politically. Reporting meant collaborating with a system that was unlikely to produce any remedial results, while reinforcing notions of racial superiority held by white male police officers. The conclusion

that by the end of apartheid '... it was an inefficient and ineffective police force, which had lost the confidence of the South African public'<sup>201</sup> is undoubtedly true. Going into the transition, the SAP was a highly politicised institution which lacked popular legitimacy and was widely feared. It was also, as would become increasingly obvious over the ensuing decades, an institution which lacked the core competencies to be able to effectively investigate 'ordinary' criminal activity.

As much as the SAP's law enforcement priorities were dictated by the ideological imperatives of apartheid, so too was its structure.<sup>202</sup> Ten police agencies were created to serve the Bantustans, nominally independent homelands and tribal territories created by the South African government within its borders to further the grand apartheid dream of 'separate development'. Although technically accountable to and mirroring the structure of the SAP, each also had its own administrative structure. Going into South Africa's transition the senior ranks were overwhelmingly white and almost exclusively male. Black police officers filled low-ranking positions and were subjected to discriminatory promotion policies and practice.<sup>203</sup> Although the police saw themselves, in many respects, as having a God-given mission, it was also a low-status job, attracting exactly the type of working-class Afrikaner males that race-based job-protection had been designed to benefit, with the result that '... the SAP became to some extent a refuge of last resort for white men who could not get jobs elsewhere.'<sup>204</sup> As a result, the quality of recruits was generally low. At separate racially segregated training colleges recruits were provided with quasi-military training, focused on '[d]rill, physical training, sport and musketry,' with little attention being given to 'police ethics and the problem of developing discretion in the application of the law.'<sup>205</sup>

In 1989, for the first time, a South African president began to talk about 'depoliticising' the police. Although FW De Klerk had stated this intention to the SAP leadership,<sup>206</sup> Cawthra points out that in 1992 much of the (often secret) police security apparatus was still in place, along with an 'old guard' of generals. There is ample evidence that at that time and right up until the democratic elections in 1994, the police were involved in attempts to destabilise communities seen to be favourable to the African National Congress, most notably in KwaZulu-Natal, where they actively supported and even provided paramilitary training to anti-ANC

forces.<sup>207</sup> Our KwaZulu-Natal study area was a hotspot of violence. At the time, an estimated 70-90 per cent of white police were believed to support ultra conservative right-wing movements.<sup>208</sup> The potential for the police and the military—with tens of thousands of disaffected armed white men between them—to derail South Africa's fragile transition to democracy was a matter of constant concern in the early 1990s. Security sector reform was therefore a top priority, and a prerequisite for, democratic transition.<sup>209</sup>

The government-in-waiting was well aware of the challenges that this would pose. As early as 1991, Penuell Maduna, who would later become Minister of Justice, acknowledged that '... the political and economic reality confronting us all is that there is no question of the (SAP) ... being dismantled and replaced with a new police force ... We are constrained to talk about the need to transform the existing forces and instruments of the law and infuse them with new, humane and democratic values and personnel'.<sup>210</sup> In practical terms, reform of the South African police over the next decade came to be focused on two overarching concerns. The first was the relatively pragmatic problem of integrating and rationalising the various police forces operating in South Africa at the time, along with the armed forces of the liberation movements. The second was the fundamental problem of ensuring democratic accountability and legitimacy, both to the new government and to the broader South African citizenry.<sup>211</sup> In essence, therefore, the 'transformation process' amounted to a thoroughgoing internal restructuring and an external reorientation, with very little attention paid to core police competencies.<sup>212</sup>

#### 'TRANSFORMATION'

The immediate task facing South Africa's new democratic government was integrating the 11 police forces in its territory—not an easy task under any circumstances, let alone within a context of unprecedented social and political change. At the same time that the former 'homelands' were being (re)integrated into the country, South Africa was also being re-divided into nine new provinces, from the previous four, necessitating the redrawing of policing boundaries. A single head office was established, and all budgets, policies and procedures were standardised.<sup>213</sup> Facilitating integration between the forces and the demilitarisation of the police—

converting it into a service, signalled by its name change—new uniforms and insignia were designed, military-style vehicles were decommissioned and others overhauled to reflect the new ‘corporate colours’ of the police. New staffing structures were created at middle and upper management levels and the posts filled from within and outside the SAP.<sup>214</sup> The aim was to fundamentally and rapidly change the demographic profile of the police to be more representative of the people that it served and to provide opportunities for those who had been disadvantaged by racist and sexist policies and practices in the past. Provision was made for some degree of fast-tracking and the lateral entry of external candidates into leadership positions.<sup>215</sup>

The SAPS currently has around 155 500 policing personnel.<sup>216</sup> With a ratio of 1 police officer to every 341 citizens the SAPS appears reasonably well staffed. One of the problems has been that fewer than 20 per cent of those police officers are detectives, and a substantial minority of those have actually been trained as detectives.<sup>217</sup> This means that in 2003, for example, 25 884 detectives were responsible for investigating the 2.5 million crimes committed in South Africa that year.<sup>218</sup> This distribution of functional responsibilities in the SAPS was characterised by Martin Schönreich as ‘the opposite of international policing norms’<sup>219</sup> and by Ted Leggett as ‘absurd’.<sup>220</sup> The SAPS finally recognised this problem and designated 2012/13 as ‘The year of the detectives’, aimed at building detective capacity in the SAPS. That the number of detectives, their training and their workloads remain a serious problem has been amply evidenced in the hearings of the Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and of a Breakdown in Relations Between the Community and the Police in Khayelitsha held in 2014.<sup>221</sup>

At the same time that systems and structures were being reformed, a vision of change was adopted to ‘... transform the SA Police Service into a professional, representative, efficient and effective, impartial, transparent and accountable service which would uphold and protect the fundamental rights of all people, and which would carry out its mission in accordance with the needs of the community’.<sup>222</sup> This aim of creating a new shared mission for the police was supported by some of the changes described above, which facilitated the entry of new people into different levels of the service and created a new ‘brand’ to which they could affiliate.

Internally it saw the introduction of flatter, more participatory, management structures, in preference to the hierarchical military-style command and control structures, further impacting on accountability structures.<sup>223</sup> Externally, 'community policing', with its focus on principles of accountability, participation and transparency to the community, proved to be a seductive paradigm, and became the vehicle for transforming relations between the police and the communities they served.<sup>224</sup> This entailed getting to know those communities and putting in place structures through which these relationships could be channelled.<sup>225</sup>

Whereas under apartheid most police stations and resources had serviced white, urban areas, it was now necessary to factually determine what and where the needs were for police services and to redirect these to historically disadvantaged areas, including the building of new police stations. From here developed a plan which conceptually linked service delivery to community policing. While there was no doubt a recognition that the effective *investigation* of reported crimes was an important indicator of service delivery, the main thrust of the programme was on training facilitators, establishing community partnerships and setting up Community Police Forums, and producing consultative plans for rolling out services.<sup>226</sup> Recommendations for training interventions, made by various scholars and NGOs at the time, similarly focused, broadly speaking, on 'transformation' rather than basic skills development. These included 'active instruction in human rights issues and non-racism', 'instruction in minimum-force methods', 're-orientation towards public service skills', and 'community policing'.<sup>227</sup>

The assumption underpinning police transformation during South Africa's transition seems to have been that there was a sufficiently strong base level of policing and investigative skills that could be reoriented away from the racist, militarised culture of the SAP towards a more community-oriented style of policing. Given the critical interventions required to shift the institutional culture of the police, and given the effectiveness of the police in enforcing the criminalisation of millions under apartheid, it was perhaps not unreasonable to assume that this aspect of service delivery was already, at least to some extent, taken care of.

Rauch points out that

... despite their lack of skill in dealing with crime, the South African Police were notoriously effective against their political opponents. It never occurred to the leaders and members of the African National Congress (ANC)—the main democratic opposition party—that the police who had been so ruthlessly effective against them would be any less effective against criminals in the new era.<sup>228</sup>

But, as Cawthra notes, '[t]he "law and order" imposed by the security forces was superficial and rested on continued repression'.<sup>229</sup> With the lid of oppression lifted and police energies largely oriented towards their own restructuring, crime rates soared and police responses were found to be extremely inadequate.

### **The study 'communities'**

Apartheid perverted individual identities, dislocated families and fragmented communities. In pursuance of its policies of racial segregation, the apartheid regime uprooted entire communities and resettled them in barren 'townships' or in 'tribal homelands'. Today South Africa is one of the most unequal countries in the world. Disparate access to social and economic resources and opportunities force people into situations where they are structurally more vulnerable to criminal victimisation.<sup>230</sup> Crowded living conditions in informal dwellings, a lack of street lights, inefficient public transport, and having to leave the house to get water or to go to the toilet are everyday realities for many of the complainants represented in this book. While certain behavioural adaptations are possible, many women (in particular, but men also) do not have a choice about the modes of transport they use and the spaces they frequent, living in a constant state of vigilance.<sup>231</sup> This precarious reality, explicated more fully below, provides the reader with a sense of—quite literally—where women are coming from when they disengage from the criminal justice system. It also illustrates many of the challenges associated with policing jurisdictions that are not only culturally and linguistically diverse, but also contain pockets of extreme poverty, where many 'streets' don't even have names, juxtaposed



against islands of wealth comparable to the most affluent in any developed country, policed by private security companies.

Some 20 years after South Africa's first democratic elections, communities throughout the country retain the racially exclusive spatial identities entrenched by apartheid. For the most part, the fault lines of class and race converge in these geographic spaces. The unequal distribution of political and economic resources has allowed racial segregation to persist well after explicit, legally enforceable, racial segregation has been removed. As Richard Ford argues, '[r]ace-neutral policies, set against a historical backdrop of state action in the service of racial segregation and thus against a contemporary backdrop of racially identified space—physical space primarily associated with and occupied by a particular racial group—predictably reproduce and entrench racial segregation and the racial caste system that accompanies it'.<sup>232</sup>

One in four South Africans is unemployed, with a higher unemployment rate for women (27 per cent) than for men (23 per cent).<sup>233</sup> More than half of South Africans between the ages of 15 and 24 are unemployed, as are nearly a third of those between the ages of 25 and 35.<sup>234</sup> Remarkably, 82.8 per cent of the unemployed in the former age group, and 64.6 per cent in the latter, have never held a job.<sup>235</sup> Coupled to this are extremely high levels of poverty and inequality. Steve Mokwena argues that the structural emasculation of men by the apartheid system and contemporary adherence to notions of masculinity which are closely tied to gendered expectations of obtaining work, allows unemployment to be seen as a personal rather than a social failure, further entrenching what he describes as 'chronic feelings of inferiority'. He suggests that one of the ways in which this sense of 'powerlessness and impotence' manifests itself is in high levels of violence against women.<sup>236</sup> It also manifests in high levels of alcohol and drug abuse.<sup>237</sup> The structural conditions that force women to live in crowded conditions, to use public transport in search of work, and to traverse poorly lit township roads and public spaces,<sup>238</sup> also increase women's vulnerability to sexual violence. Although economic opportunities have become more widely available to all South Africans, it remains largely true that where you live in South Africa signifies race, class and, concomitantly, access to opportunities and justice. It is therefore important to understand the socio-demographic profile of the

communities from which the cases in this book are drawn, the structural constraints that residents face—many of which compromise their safety—and the challenges of providing an effective policing service to those communities.

## Western Cape

The Western Cape Province is home to about 11 per cent of South Africa's population.<sup>239</sup> The jurisdictions covered by the Ocean View, Fish Hoek, Muizenberg and Simon's Town police stations reflect an often-startling disjuncture in terms of wealth, education, language preference and access to services between the various communities served by a single police station. Each police station does not serve a single 'community' which is largely homogenous in terms of population and expectations, but a conglomeration of fractured and divergent settlements, with differential access to resources and often conflicting needs.

### OCEAN VIEW POLICE JURISDICTION

Ocean View Police Station serves a population of around 28 000 people. Taken together it is broadly representative of the demographics of the Western Cape: 57 per cent are coloured, 30 per cent are African, and 13 per cent are white.<sup>240</sup> The residual impact of apartheid is seen, however, in four distinct residential areas—Kommetjie, Capri Village, Ocean View and Masiphumelele—all served by this police station, each with a very different demographic and social profile. A more appropriate representation of the area is gained by looking at disaggregated data, which shows the overwhelming racial exclusivity of each suburb.

Kommetjie (pop. 2 500) and Capri Village (pop. 1 300) are reasonably affluent suburbs, which are overwhelmingly white (96 per cent and 91 per cent respectively). Like other formerly 'white' communities in the study areas they are relatively well resourced and marked by the heavy presence of private security, both in the form of armed response services and the prevalence of gated communities. Community members are active in highly visible neighbourhood watches and civic associations, through which they are able to articulate their demands for better policing and initiate various crime prevention activities.

Much of the South Peninsular became 'white' as a result of the forced removal of black African and then coloured residents, starting in the 1950s and continuing into the early 1970s.<sup>241</sup> Ocean View (pop. 16 000), in particular, is a community created through and devastated by forced removals. It was established in 1968 for coloured residents removed from the 'white' group areas of Simon's Town and Noordhoek. Africans had already been removed from Simon's Town to Gugulethu, on the Cape Flats, in 1965. Ninety eight per cent of the population is consequently characterised (or self-defined) as 'coloured'.<sup>242</sup> Masiphumelele (pop. 17 000),<sup>243</sup> only five kilometres from Ocean View, is 97 per cent black African<sup>244</sup> and was established in the early 1990s with the consolidation of a number of informal settlements or 'squatter camps' in the area. It was the fifth of the potential sites considered, and is still colloquially known as Site 5. Most residents are Xhosa-speaking and many retain strong links with the Eastern Cape province. Ocean View and Masiphumelele are substantially more congested than, for example, Kommetjie. While the latter has 583 residents per square kilometre, Ocean View and Masiphumelele have more than five times that density, with 2 513 and 2 803 residents per square kilometre respectively.<sup>245</sup>

The populations of both Ocean View and Masiphumelele are remarkably young. Sixty nine per cent of men and 64 per cent of women in Ocean View are under the age of 35. A staggering 79 per cent of women and 76 per cent of men in Masiphumelele are under the age of 35.<sup>246</sup> Equally devastating are the low levels of education and employment. In Ocean View only 19 per cent of residents have finished school, although only one in five residents is unemployed.<sup>247</sup> In contrast, unemployment in Masiphumelele runs at 59 per cent, with 22 per cent of residents not finishing school. Not surprisingly, income levels reflect the impact of low education levels. Four out of five households in Masiphumelele earned less than R19 200 in 2001, the household subsistence level calculated for that year by Statistics South Africa.<sup>248</sup> The City of Cape Town's administration categorises Masiphumelele as one of the worst 20 per cent of suburbs in the City in terms of socio-economic status. In contrast, 39 per cent of Kommetjie residents and 45 per cent of Capri residents have tertiary education and unemployment in those suburbs is between 4-6 per cent. While 92 per cent of Masiphumelele residents live

in shacks or informal dwellings, 99 per cent of those living in Kommetjie and Capri, and 92 per cent of those living in Ocean View, do not.

Both Masiphumelele and Ocean View are marked by extremely high levels of alcohol abuse and other social problems associated with poverty. The area covered by the Ocean View Police Station contains no fewer than 134 liquor outlets, most of them informal 'shebeens', which are unlicensed and unregulated. Four of the total number of liquor outlets are in Kommetjie, 87 in Ocean View and 43 in Masiphumelele. All 42 places identified by a recent University of Stellenbosch survey as selling illegal drugs in the Ocean View Police Station's jurisdiction are in Ocean View.<sup>249</sup> Not surprisingly, a study of adolescents in the area found that '[t]he narratives of relationships in Ocean View are permeated ... by material hardship, violence, alcohol and drug abuse and death.'<sup>250</sup>

The population served by the Ocean View Police Station is further divided in terms of language, with three distinct language groups adding demands to the policing services provided in this jurisdiction. Eighty-two per cent of Kommetjie and Capri residents are English-speaking. In contrast, 92 per cent of Masiphumelele residents are Xhosa-speakers and 68 per cent of Ocean View residents speak Afrikaans, with 31 per cent speaking English. In Masiphumelele 5 per cent of the population speaks another African language—possibly another South African language, but more likely, given the prevalence of refugees and asylum seekers in the area, a non-South African language.<sup>251</sup>

#### SIMON'S TOWN POLICE JURISDICTION

Simon's Town Police Station serves Simon's Town (pop. 2 800), Scarborough (pop. 1 061), Da Gama Park (pop. 504), Glencairn (pop. 1 733) and Redhill Informal Settlement (pop. 654). The area is overwhelmingly (61 per cent) white, with 20 per cent of the population being African, 11 per cent coloured and 8 per cent Indian. Simon's Town is one of the oldest settlements in Cape Town. It was historically a 'mixed race' area, but was subject to brutal forced removals of black Africans and coloured people in the 1960s and 1970s. Since 1994 the South African government's land restitution programme has enabled some former residents to return to the area. Additionally, both Da Gama Park and Simon's Town are more integrated racially because of the preponderance of residents employed

by the South African Navy—Simon's Town being its main naval base—and the increased racial representivity of that institution. This increased diversity is reflected in the fact that 21 per cent of residents are Afrikaans speaking, and 8 per cent speak an African language (either Xhosa or another African language), with most of the remainder speaking English. Eighty one percent of residents have finished school. Almost a third has some level of tertiary education. Only 4 per cent are unemployed.

Scarborough's population of 1 061 people is, similarly, overwhelmingly white (96 per cent). Historically comprised of holiday homes, more people are now living permanently in the area. Although only around 50 per cent of residents are employed, of the 206 who were classified as 'unemployed' in the 2001 census, only 6 indicated that they were looking for work. It's safe to assume that the rest surf. Glencairn reflects a similar prevalence of well-educated and fairly well-off residents. Da Gama Park is something of an anomaly, as it belongs entirely to the South African National Defence Force and comprises accommodation for permanent members of the South African Navy and their families.

Simon's Town Police Station also serves the Redhill Informal Settlement, which is situated on private property directly abutting Scarborough. The City of Cape Town provides water and electricity to the perimeter of the site, although the majority of people (93 per cent) use paraffin and candles for lighting and access to water is via a standpipe. Eighty per cent of the residents are black African, with a sizeable coloured population (17.5 per cent), mostly residing as workers on smallholdings abutting the settlement. Seventy-three per cent of residents are under the age of 35 years. Ninety-five per cent of residents aged over 20 have not finished school and 49 per cent have less than five years of schooling. The predominant language spoken is Xhosa (76 per cent), followed by Afrikaans (19 per cent) and English (5 per cent). Interestingly, 75 per cent of residents are employed. This reflects the fact that most people settle in Redhill in order to be close to their workplace on the surrounding small-holdings, in residential areas or in the Table Mountain National Park. That said, 91 per cent percent of residents earn less than R1 600 a month and 97 per cent have an annual household income of less than R76 800. All the properties in the Redhill settlement comprise corrugated

iron or wooden shacks and none have piped water inside the dwelling. Sixty-one per cent have no toilet or latrine.<sup>252</sup> Not surprisingly, the City of Cape Town's levels of living index (which combines socio-economic status and various service delivery indicators) ranks it among the 15 worst areas in the City.<sup>253</sup>

#### MUIZENBERG POLICE JURISDICTION

The Muizenberg Police Station serves a population of 11 418 people, of whom 63 per cent are coloured, 21 per cent African, 12 per cent white and 4 per cent Indian. Although two of the four suburbs covered by Muizenberg Police Station are almost exclusively white, there is markedly more integration in the suburb of Muizenberg itself, which is where the police station is situated, than in any of the other suburbs covered by this study.

Although historically classified as a 'white' group area, Muizenberg is one of the parts of Cape Town where the apartheid government struggled to enforce racial exclusivity, largely because its geographical position allowed for a fluidity of movement that was not possible elsewhere on the Peninsula. This openness also contributes to a reputation for gang activity and associated drug-related crimes. The extent of integration in Muizenberg can be seen in the ethnic breakdown of the 11 418 residents, with 27 per cent of the population registered as black African, 36 per cent as coloured, and 36 per cent as white. English is spoken by 46 per cent of residents, followed by Afrikaans (32 per cent) and Xhosa (18 per cent).

Almost two-thirds of the residents in this area are under 35 years of age (63 per cent). Fifty-one per cent have not finished school (but 16 per cent have some level of tertiary education). One in four people over the age of 15 living in Muizenberg is unemployed. Seventy-nine per cent earn less than R6 400 a month, with more than half of those earning less than R1 600. While 73 per cent of households have an annual income of less than R76 000, a sizeable 27 per cent earn above this threshold, reflecting Muizenberg's split identity, with pockets of wealth in close proximity to overcrowded tenement buildings and 'no go' areas controlled by drug lords. Muizenberg Police Station's jurisdiction also includes the 'less formal' area of Seawinds and the 'informal settlement' of Vrygrond, marked by underdevelopment and extensive drug and alcohol abuse.

One indicator of this disparity is the density of development. In Muizenberg proper there are a mere 179 dwellings per square kilometre. Immediately adjacent, Vrygrond has more than 10 times this density at 1881 dwellings per square kilometre.<sup>254</sup> A substantial number of the cases in this book come from these parts of Muizenberg.

Muizenberg Police Station also serves the upmarket areas of Lakeside (pop. 2 071) and St James (pop. 687), where more than a third of residents have tertiary education, there is only a 2 per cent unemployment rate, and the majority of residents earn a middle-class income of more than R76 801 per annum. Like most affluent areas, there is a prevalence of private security. Taking this one step further, Marina Da Gama (pop. 3 763), which shows a similar profile, is a semi-gated community, bounded by wetlands on one side and a limited number of entrances on the other. It is patrolled by a private security company paid for by moneys levied by a statutorily established home-owner's association.

#### FISH HOEK POLICE JURISDICTION

The Fish Hoek jurisdiction is by far the most demographically homogenous. Fish Hoek (pop. 9 741) is a predominantly middle-class suburb, which is 96 per cent white. It is also a popular place to retire, reflected in the fact that almost 30 per cent of residents are over the age of 65. The majority of residents have completed school, and unemployment is in the order of 6 per cent. Household incomes are slightly lower than in comparable areas, explained by the fact that many people are on pension. Fish Hoek Police Station also serves Kalk Bay (pop. 958), Clovelly (pop. 548), Sun Valley (pop. 3 884) and Noordhoek (pop. 4 902). This is a geographically large area, although the population is not nearly comparable in size to that served by, for example, Ocean View Police Station. Kalk Bay, like Muizenberg, is one of those areas over which the apartheid government never entirely managed to enforce exclusive group areas. A large number of coloured fishing families have lived in the suburb for generations and put out their boats from the picturesque Kalk Bay harbour. Since 1994 the area has become gentrified (reflected perhaps in the fact that around 5 per cent of residents have Masters and doctoral degrees) and developed as a tourist destination. Clovelly is a very upmarket and affluent area, as are parts of Noordhoek. Noordhoek's census figures reflect, however,

that among the immense wealth that is prevalent in the area (including mansions priced at R20m plus) are pockets of extreme poverty and vulnerability, with squatters living in the dunes and wetlands in extremely precarious conditions. Thirteen percent of dwellings in Noordhoek are consequently classified as informal dwellings or shacks. In many cases these amount to nothing more than a few sticks and a sheet of sailcloth. Twenty-eight per cent of people in this area are Xhosa-speaking, while the remainder of the Fish Hoek jurisdiction is predominantly English, at over 80 per cent. Twenty-four per cent are unemployed.

### **KwaZulu-Natal**

KwaZulu-Natal accounts for 20 per cent of the South African population. The police stations selected for this study are far more homogenous than those in the Western Cape. They are also deeply rural, with only Greytown constituting a reasonably sized town (pop. 9 090). The area has been at the centre of political conflict, well into the 1990s, and has been a site of violent land dispossession and forced removals over 150 years. Unemployment levels are staggering. Policing is complicated by the parallel system of traditional courts which have operated through colonial and apartheid rule and continue to function in the area. There is little evidence of cooperation between these systems, despite the constitutional recognition in South Africa of customary law, as a system of law with equal status to statute and common law.

#### **GREYTOWN POLICE JURISDICTION**

The town of Greytown was established in 1854. In terms of demographic breakdown, 60 per cent of residents self-classify as African, 22 per cent Indian or Asian, 11 per cent white and 5 per cent coloured.<sup>255</sup> Language preference mirrors this breakdown, with 53 per cent indicating that they speak Zulu as a first language, 37 per cent English and 5 per cent Afrikaans. Within the broader municipal area, 27 per cent of those aged 20 and above report that they have had no schooling, while one in four people in this age group have some secondary education, 23 per cent have completed Matric, and 5 per cent have some form of higher education. A third of residents are under the age of 24 years. Unemployment is in



the region of 41 per cent and 57 per cent of household subsist on less than R19 600 per annum. A sex ratio of 56 women to 44 men shows the impact of migrant labour. What has come to be characterised as a crisis in the formation of customary unions is reflected in the fact that 76 per cent of residents describe themselves as never married. Only 20 per cent of households have access to piped water within the dwelling, and 23 per cent of households have a flush toilet that is connected to a sewerage system. Fifty-eight per cent of households have access to electricity for lighting. Forty-four per cent of residents live in a tribal/traditional area. While 78 per cent have access to a cellphone, 93 per cent do not have access to a computer and 78 per cent have no internet access. Sixty per cent do not have access to a refrigerator. Twenty-seven per cent obtain household water from a stream, while 46 per cent of people use pit latrines and only 30 per cent have access to a flush toilet on their premises.<sup>256</sup>

#### WEENEN POLICE JURISDICTION

Weenen is Dutch for 'to weep'. The town is the second oldest settler village in KwaZulu-Natal.<sup>257</sup> At the time it was settled in 1838, the area was occupied predominantly by Zulu-speaking people of the Mthembu and Mchunu tribes. Early Dutch settlers claimed title to the farm land, relocating indigenous people to reserves or to the farms of white absentee landowners who used these farms as labour reserves for other commercial farms in the Natal Midlands. There they had to work as labour tenants in order to retain access to land. It was a site of massive forced removals, with the regular bulldozing and burning of settlements that refused to move. After Weenen was declared a white group area, around 3000 people were forcibly removed from the town to relocation camps, many in the Msinga area. Most people were forced to sell their cattle for a fraction of their value when they were finally moved either to KwaZulu or to other sites in Natal.<sup>258</sup>

Today, ninety per cent of the broader Weenen population is black African, 6 per cent Indian and 2 per cent white.<sup>259</sup> Again the sex ratio is skewed towards women, with 54 women to 46 men and 72 per cent of people report never having been married.<sup>260</sup> Zulu is spoken by 84 per cent of the population and English by 10 per cent.<sup>261</sup> Twenty-nine per cent of those aged 20 years and older in the municipality have some

secondary education, 26 per cent have completed matric, and 8 per cent have some form of higher education. Seventeen per cent of those aged 20 years and older have no formal schooling. While 85 per cent of people have access to a cellphone, only 14 per cent have access to a computer. Three quarters of people do not have access to a car. In contrast to the Greytown jurisdiction, 70 per cent of households obtain water through a water scheme operated by the municipality, but 10 per cent still obtain water from a river or stream. Twenty percent of people use pit toilets, while 18 per cent of people report that they have no toilet facilities at all. Fifty-three per cent are unemployed and 51 per cent live on a household income of less than R19 600 a year.

#### TUGELA FERRY/MSINGA POLICE JURISDICTION

Msinga is located in the Umzinyathi District Municipality in KwaZulu-Natal. The terrain is very rugged and there are few municipal services in place. This is most notable in the lack of access to water. The area is almost entirely rural, with 99 per cent of people living in non-urban areas.<sup>262</sup> Rauri Alcock writes that

‘Msinga is one of South Africa’s poorest and most arid areas, and until fairly recently, the centre of the gun trade in South Africa. Although there are few families who have no experience of violence, in the past ten years HIV/AIDS has become an increasing threat, and in 2006 Msinga was in the headlines with the appearance of a deadly, multi-drug-resistance form of TB [tuberculosis]’.<sup>263</sup>

Ninety-nine per cent of people living in the area are black Africans. Fifty-seven per cent are women and 43 per cent men. As in other areas, marriage rates are low. Of those aged 20 years and older, 41 per cent have no formal schooling. Only 17 per cent have completed Matric, and 3 per cent have some form of higher education.<sup>264</sup> There are 37 724 households in Msinga, with an average household size of 4.6 persons per household. Sixty-seven per cent of all households are headed by females.<sup>265</sup> In terms of services, only 4 per cent of households have access to piped water within the dwelling. Two thirds of households use candles for lighting and three quarters use wood for both cooking and heating.

Only one in four households has electricity. While 75 per cent of people have a cellphone, 87 per cent have no internet access and 97 per cent have no access to computers. Ninety per cent have no car and 77 per cent have no refrigerator. Pit latrines are the norm for 61 per cent of people and 23 per cent report that they have no toilet facilities at all. One in three households fetch their water with buckets from a river or stream. Sixty-four per cent of households live on less than R19 600 per year. Seventy-five per cent of those aged between 15-64 years are unemployed.<sup>266</sup>

#### MUDEN POLICE JURISDICTION

The Muden area is among the Upper Tugela tributaries of KwaZulu-Natal, with Muden itself being a small village connected to Weenen in the west and to Greytown in the east.<sup>267</sup> The local municipal area has a population of 38 103, with a sex ratio of 48 males to 52 females. Seventy-two per cent of people report that they have never married. Africans constitute 92 per cent of the population, while 5 per cent classify themselves as white and 2 per cent as Indian. Eighty-five per cent of people speak Zulu and 7 per cent English. The predominant occupation is agriculture, with a wide range of agricultural products being produced. Dairy and stock farming are, however, the main farming activities.<sup>268</sup> The area is facing increasing unemployment (currently at 35 per cent), with men losing their wage jobs and women increasingly relied upon to provide for the household's needs via child support grants.<sup>269</sup> Forty-eight per cent of households are living on under R19 600 per year. As elsewhere in the area, land is a flashpoint. The Human Sciences Research Council points out that 'the history of the Muden area is characterised by profound racial tensions stemming from extensive land deprivation and stock clearances, the last wave of which occurred in the 1970s'.<sup>270</sup> People dispossessed of their land were largely moved to Msinga or kept on as labour tenants or farm workers. Land restitution and service delivery protests are ongoing and escalating as frustration grows.<sup>271</sup> Seventy-six per cent of people reside in a formal dwelling, with 83 per cent having access to piped water from either inside the dwelling, inside the yard, or a community standpipe. Ten per cent of people must go to a river or stream to get water. In Mpofana, 59 per cent of households have access to a flush toilet, but 25 per cent still use pit latrines. Cellphone ownership is reported by

88 per cent, but at the same time 89 per cent have no access to a computer and 75 per cent have no access to the internet. Eighty-two per cent have no car.<sup>272</sup>

\* \* \*

Geographical spaces and the living conditions that are embedded into those spaces create conditions of vulnerability. Many of the communities in this study show extreme levels of disorganisation and even chaos. There are few employment or recreational opportunities, living conditions are crowded, alcohol and drug abuse is rife. As Iglesias suggests, it is impossible to separate such conditions from the manifestation of sexual violence within marginalised communities. She argues that looking at sexual violence in this way, 'offers a perspective from which the root of women's sexual oppression is located not so much in male power as in the mechanisms through which men attempt to cope with, deny, and disguise their powerlessness.'<sup>273</sup> One cannot divorce gender oppression from the conditions in which the majority of South Africans—male and female—live. Equally, one cannot begin to understand how victims of this violence engage with one of the few relatively accessible state resources available to them, the criminal justice system, without appreciating the lack of social support and cohesiveness that marks people and 'communities' which are simply trying to survive.

## CHAPTER 4

### A Sketch of the Cases

It is important to bear in mind that the cases described here are those in which a verdict was not returned in the eight jurisdictions. This includes those cases that were not referred by the police for a decision by the prosecutor, where the prosecutor decided not to prosecute and where the case was withdrawn after enrolment. They are therefore not necessarily reflective of cases *reported* and no inference can be drawn about the reasons associated with the decision to close a case rather than pursue a prosecution. What they do is provide an important insight into the profile of cases that were disposed of by the police. Even a casual scan of the cases should raise concern about the number of violent rapes, perpetrated by strangers or near-strangers, which did not proceed to trial. Not all data was collected at both sites, as reflected below, so there are gaps in our ability to compare sites.

#### The complainant

##### AGE

The age of the complainant was analysed using ranges. In the Western Cape I used: under-12 (selected because this is the age below which, in law, a child cannot consent to sexual intercourse); 12 to 16 (selected because this is the age range in which the law, by statute treats the child's consent to sexual intercourse as irrelevant); 17-25; 26-35; 36-45; 46-55; 56-96. In KwaZulu-Natal (KZN) we added the category 16-18, so that we were able to capture all children as a discrete category, and then worked on 19-29, 30-39 and so on. In the Western Cape study only one rape was reported in the over-56 category, of a 77-year-old woman, and only four rapes of women aged between 46 and 55. In KZN there was also only one report of a victim over the age of 50 years. Thirty-seven

were under the age of 18, and 11 of those children were under the age of 12. One of the children, a four-year old boy, was the only male victim. Unfortunately, the age of the complainant was not always recorded in the docket. The vast majority of cases in both provinces involved women under the age of 35 (88 per cent in the Western Cape). Twenty-five of the Western Cape cases involved girls aged between 12 and 16 years and a further 14 cases involved girls under the age of 12. This was true for 37 of the KZN cases, where 12 were under the age of 16 and 11 under the age of 12 years. The import of this is that in nearly 30 per cent of the Western Cape cases and 37 per cent of the KZN cases the complainant was either legally incapable of consenting to intercourse or barred from doing so by statute.<sup>274</sup>

#### EMPLOYMENT STATUS

Employment status gives an indication of the potential economic and social resources that the complainant can call upon both to weather the impact of being raped and to stay the course during the criminal justice process. Factors such as whether the complainant can afford the transport to come to court, to pay for childcare, to take time off work, to access psycho-social support, and the marginality of her daily existence, are important considerations, which restrict the choices that she is able to make. Read against the broader economic indicators described in the previous chapter, employment status also gives us some idea of the potential dependence of the complainant on intimate-partner perpetrators. Forty per cent of the Western Cape complainants were unemployed, while 24 per cent indicated that they had a job.<sup>275</sup> Most worked in elementary professions and as domestic workers. In contrast, only 15 per cent of KZN complainants were recorded as being employed. In a study like this there is no way to capture the extent of women's under-employment and the precariousness of the elementary and unskilled positions filled by many of those complainants who indicated that they were 'employed'. Fifteen cases involving victims over the age of 16 in the Western Cape and 28 in KZN did not provide the complainant's employment status at all. This means that it was not recorded either in the 'complainant profile' accompanying her statement or anywhere else in the docket (her statement, in the investigation diary—where a detective might, for

example, have indicated that he had called the complainant at work—or in any other statements). One assumption would be that if the complainants had been employed this would have been recorded (taking unemployment rates to over half of the complainants) but, given the poor recording practices I observed, making such an assumption is risky. What can be said is that there is every reason to include such data: it gives the detective an indication of the resources available to the complainant and, importantly, given the number of cases disposed of because the complainant could not be traced, provides an alternative means of contacting her.

#### RELATIONSHIP OF THE COMPLAINANT TO THE ACCUSED

There are a number of ways of looking at relationship data in the context of rape cases. Firstly, it provides us with some insight into the potential relationship dynamics that might inform the complainant's choices about continued engagement with the criminal justice system. Abusive intimate relationships are notoriously difficult to break out of, held together by bonds of economic and emotional dependency. Family pressure may be exerted when charges are brought against another family member. Relationship data is also suggestive of the potential evidentiary difficulties that police might be anticipating as they investigate the case (how do you prove that her spouse raped her this time?) and the biases that they are likely to bring to particular cases (can a man ever really be said to have 'raped' his wife?). More practically, the relationship between perpetrator and complainant suggests how likely it is that a positive identification of the rapist will be made.

Teasing out the nature of the complainant's relationship to the accused and the relevance thereof can be problematic in practice, as well as methodologically fraught.<sup>276</sup> It was obvious from many of the dockets that the question of how well the complainant knew the perpetrator and assumptions made by the investigating officer about this relationship were two interlinked factors that made her credibility suspect. As such, one docket might contain a complainant's statement referring to the accused as an 'acquaintance', a witness statement referring to him as a 'friend' of the complainant, and speculation in the investigation diary that he was in fact her 'boyfriend'. In these cases, I recorded the relationship claimed by the complainant, and the 'debates' reflected in the docket as to

whether this was in fact the nature of the relationship were recorded qualitatively.

Another caveat to bear in mind is the considerable debate about what amounts to an 'acquaintance' as distinct from a 'friend'.<sup>277</sup> Much of the popular discourse—and some of the literature— equates 'acquaintance rape' and 'date rape', treating both as essentially resistant to policing or at least very difficult to prevent.<sup>278</sup> Where the 'acquaintance' category includes men whom the complainant met just prior to the rape (those Estrich refers to as 'an almost but not perfect stranger'), or only knew by sight, as well as those with whom she may already have enjoyed a degree of intimacy, the category becomes a nonsensical catch-all.<sup>279</sup> Collapsing these categories elides the extent of trust that might have existed in the relationship, the strategies that the perpetrator might have used to overcome resistance, and the pressures that the complainant would be subject to, either not to report or to withdraw the complaint.<sup>280</sup> I therefore distinguish perpetrators with whom the complainant may have been in an intimate relationship (a current or former husband or boyfriend), family members and friends, all of whom might have had privileged access to the complainant, from acquaintances and perpetrators known only by sight. Where a person was classified in the docket as a 'friend', this should have been made clear by the complainant (e.g. 'he is a friend, we came from the same village'). Where a complainant said that she 'knew' the perpetrator, a distinction was drawn where it was obvious that she merely knew who he was, but was not personally acquainted with him ('known by sight') and where there was some level of prior interaction recorded ('acquaintance').

**Almost** one in four complainants in the Western Cape was raped by a stranger (24 per cent). In a further 45 cases (34 per cent), the complainant was either acquainted with the perpetrator (in that there had been some level of non-intimate verbal interaction; 22 per cent) or merely knew him by sight (12 per cent). This means that in 58 per cent of cases the perpetrator was a person who the complainant either did not know or with whom she had only a passing acquaintance. Twelve of the suspects were classified as friends (9 per cent) and a further 13 were family members (10 per cent), most of whom were stepfathers. Intimate partners



accounted for 29 of the cases (22 per cent), with the majority, not surprisingly, being former husbands or boyfriends (15 per cent). Only four husbands and six current boyfriends were implicated (8 per cent). The vast majority of the KZN perpetrators were strangers (47 per cent), while a further 19 suspects were acquaintances (31 per cent). That means that a staggering 78 per cent of reported rapes in the area were perpetrated by men who were largely unknown to the victim.<sup>281</sup>

## The perpetrator

All alleged perpetrators were men. It was noteworthy how little information on the alleged perpetrator was contained in the dockets. Arrests were effected in 67 of the Western Cape cases (51 per cent) and 43 of the KZN cases (68 per cent). However, even where there was an arrest, information on the accused tended to be incomplete. What data there is on the suspect was therefore drawn from a variety of sources within the docket, including the complainant's statement and the investigation diary, as well as the suspect's warning statement and the personal information entered on the docket cover.

### AGE OF THE ACCUSED

The age of the accused was available in 81 of the Western Cape and 38 of the KZN cases. The majority of suspects, where the age was known, were recorded as being over the age of 25 (Western Cape 63 per cent; KZN 74 per cent). Concern with levels of sexual violence perpetrated by youths is borne out by the fact that 11 per cent of the accused in the Western Cape were under the age of 16 and a further 26 per cent fitted into the 17-25 age group. In KZN 10 per cent were aged 16-18 years and all perpetrators were under the age of 50.<sup>282</sup>

### EMPLOYMENT STATUS OF THE ACCUSED

Nearly half of all suspects in the Western Cape were employed (49 per cent). Read against the fact that the majority of complainants in the Western Cape were unemployed, this suggests a relative power disparity—especially in the case of intimate relationships, but also in respect of the

perpetrator's ability to offer financial or other compensation in exchange for charges being dropped, as well as perceptions of the accused and complainant's relative social 'respectability'—and, by extension, credibility. In contrast, only one in four (24 per cent) of the KZN suspects were employed.

#### **PRIOR CHARGES**

It was surprisingly difficult to ascertain from the docket whether suspects had prior convictions. In many cases the SAPS69, which documents this information, was missing. Because a number of the dockets containing indications that there had been a prior conviction did not contain the SAPS69 form confirming this, and because the information was gleaned from various sources, including the bail application, arrest statement and suspect details on the docket cover, I decided that it would be more reliable to record previous charges than convictions. From various sources in the docket, the indication is that 31 of the Western Cape suspects (23 per cent) and 12 of the KZN suspects (19 per cent) had previously been charged with a range of criminal offences. Taking into account the number of complainants raped by strangers and the incompleteness of the dockets, it is likely that the proportion of suspects who had previously been in trouble with the law is even higher when read against the whole. That said, more than one in five cases is already a substantial number. Charges ranged from drug use/dealing to crayfish (rock lobster) poaching, to theft. These charges might not be directly relevant to the question of how dangerous the perpetrator is. However, it was possible to ascertain that 20 of the Western Cape suspects had previously been charged with interpersonal crimes. These charges included 7 of rape, 2 of murder, 1 of attempted murder, 6 of assault, and 4 of contravening a domestic violence protection order.<sup>283</sup> This means that in 15 per cent of all the cases in the Western Cape study the perpetrator had previously been charged with committing a violent crime. Of course this doesn't mean that he is guilty of the current rape charge, but it should raise serious concerns about the need to ensure that crimes committed by people with a history of violence are properly investigated.

## Nature of the offence

### NUMBER OF PERPETRATORS

In discussing the particularly violent nature of sexual violence in South Africa, commentators have pointed to the high prevalence of multiple perpetrator rapes.<sup>284</sup> The majority (79 per cent) of the rapes I studied involved a single perpetrator. Multiple perpetrators, ranging between two and five in respect of any one rape were, however, implicated in one in five cases (21 per cent in both the Western Cape and KZN), which is still a significant number.<sup>285</sup>

### WEAPONS

Complainants were threatened with a weapon in 23 per cent of the Western Cape cases and 24 per cent of the KZN cases. Of the Western Cape cases, 10 involved guns (8 of these were reported in Muizenberg) and a further 10 involved knives. In KZN, 9 involved guns and 7 involved knives. Weapons used included implements that were readily at hand, such as rocks, a plank, broken bottles, a spade, scissors, a hammer, a screw-driver, sjamboks, knobkieries and an axe. In respect of two-thirds of the threats involving weapons, the perpetrator followed through and used that weapon. As with so many other details, if the complainant was not specifically asked about weapons at the time that the statement was taken it is possible that she might not mention it spontaneously and that information is lost, so what is recorded here is what was recorded in the docket.<sup>286</sup>

### INJURY

Studies have found that women are more likely to report being raped when they are injured and that the police are more likely to take those cases seriously.<sup>287</sup> In 80 per cent of the Western Cape cases and 84 per cent of the KZN cases, the results of the medical examination were recorded on a form called the J88. Where this form was absent the reason was generally noted in the docket as being that too great a time had elapsed between the alleged rape and the complaint, thus making the examination redundant. Of the 105 Western Cape J88s completed, 58 per cent contained findings of trauma to the complainant's genitals. Of

those 61 cases 50 per cent also contained evidence of non-genital injury. A further 16 cases contained evidence of physical injury to the complainant, although no evidence of genital trauma was recorded. In other words, 45 per cent of the cases in which a medico-legal examination was performed recorded physical injuries other than to the genitals. A sample of these injuries is reflected in the table below, along with the relationship of the perpetrator to the victim and the outcome of the case. I have directly transcribed the clinical terms used in the J88s and have included a glossary of key terms directly below the table.

**Table 4.1 Sample of injuries, with relationship and docket status**

HEAD & NECK INJURIES	OTHER BODY INJURIES	PERPETRATOR	DOCKET STATUS
	<ul style="list-style-type: none"> <li>• Multiple bruises &amp; scratches (linear) along legs, buttocks and extensor aspects of upper limbs;</li> <li>• Bruising on inner aspect of both thighs</li> </ul>	Stranger	Undetected
<ul style="list-style-type: none"> <li>• Subconjunctival hemorrhages—eyes;</li> <li>• Petechial hemorrhages—soft palate;</li> </ul>	<ul style="list-style-type: none"> <li>• Massive bruising on neck, forearm, inner thighs</li> </ul>	Stranger	Undetected
<ul style="list-style-type: none"> <li>• Paratracheal bruising in keeping with history of choking with hand;</li> <li>• Associated conjunctival petechial hemorrhages</li> </ul>		Stranger	<i>nolle prosequi</i>
<ul style="list-style-type: none"> <li>• Bruises and scratches on her face, neck, shoulders</li> </ul>	<ul style="list-style-type: none"> <li>• Bruises to upper chest, lower arms and inner thighs, lower abdomen and both lower legs</li> </ul>	Known by sight	<i>nolle prosequi</i> —Complainant not interested/didn't follow up
<ul style="list-style-type: none"> <li>• Large swelling and bruise occipital head;</li> <li>• Tender left zygome</li> </ul>	<ul style="list-style-type: none"> <li>• Tender ++ anterior chest wall and epi-gastric area</li> </ul>	Acquaintance	Complainant 'untraceable'

# A SKETCH OF THE CASES

<ul style="list-style-type: none"> <li>• Tender swelling of L anterior forehead above medial L eye,</li> <li>• Tender anterior throat</li> </ul>	<ul style="list-style-type: none"> <li>• Bruise on upper arm, tender area on thigh</li> </ul>	Ex-boyfriend	Withdrawn complainant
<ul style="list-style-type: none"> <li>• Multiple contusions to scalp;</li> <li>• Large bruise, linear to mastoid area behind left ear;</li> <li>• R periorbital haematoma</li> </ul>	<ul style="list-style-type: none"> <li>• Large bruise to upper R shoulder;</li> <li>• Multiple bruises to L arm/forearm</li> </ul>	Ex-boyfriend	Withdrawn complainant
<ul style="list-style-type: none"> <li>• Wound of lower lip</li> </ul>	<ul style="list-style-type: none"> <li>• Lacerations x4 to R hand and wrist and palm consistent with being dragged through broken window;</li> <li>• R wrist swollen;</li> <li>• Bruising down L side + scratches</li> </ul>	Ex-boyfriend	Withdrawn complainant
<ul style="list-style-type: none"> <li>• Periorbital swelling L eye.</li> <li>• Linear abrasion L cheek</li> </ul>		Recent acquaintance	Withdrawn: complainant did not appear in court
<ul style="list-style-type: none"> <li>• Tender abrasion on neck</li> </ul>	<ul style="list-style-type: none"> <li>• Extensive bruising consistent w/ forceful blunt trauma over legs, trunk, arms + neck;</li> <li>• 30 x 10 cm bruise on upper thigh from plank, # of other bruises and abrasions to torso + upper legs</li> </ul>	Husband	Withdrawn complainant
<ul style="list-style-type: none"> <li>• Multiple scalp wounds + facial wounds above both eyes</li> </ul>		Strangers	Undetected
<ul style="list-style-type: none"> <li>• Evidence of choking. Subconj.=hx. Bruising around neck/finger marks/scratch marks.</li> </ul>	<ul style="list-style-type: none"> <li>• Bruising;</li> <li>• Tears;</li> <li>• Finger marks on thighs</li> </ul>	6-year-old raped by her uncle	<i>nolle prosequi</i> : No co-operation

<ul style="list-style-type: none"> <li>• Bruises/fingerprints on neck area.</li> <li>• Subconjunctival hemorrhages.</li> <li>• Petechiae on soft palate.</li> </ul>		Friend	Withdrawn: complainant non-co-operation
<ul style="list-style-type: none"> <li>• Large bruise under right eye. Slightly swollen.</li> </ul>	<ul style="list-style-type: none"> <li>• Twisted right knee</li> </ul>	Ex-husband	Complainant untraceable
<ul style="list-style-type: none"> <li>• Lips swollen + lower lip bleeding</li> </ul>		Acquaintance	Withdrawn complainant
<ul style="list-style-type: none"> <li>• Multiple bite wounds (+/- 50).</li> </ul>		Acquaintance	Complainant non-contactable

## GLOSSARY OF TERMS

1. **Abrasion/graazes:** a wound caused by the rubbing or scraping of the skin (such as a carpet burn from being dragged).
2. **Asphyxia:** loss or blockage of oxygen.
3. **Avulsion:** tearing or chunking of the skin.
4. **Bilateral periorbital ecchymosis:** (raccoon eyes) usually caused by blunt force trauma to the back of the head, forehead or bridge of the nose.  
**Eccyhmosis:** is not a bruise, but rather a bloody rash under the skin. It spreads but is not raised and has no clear defined borders.
5. **Bruise/contusion:** caused by blunt force trauma.
6. **Conjunctival petechial hemorrhages:** pin-point (petechial) red spots (from burst capillaries) on the conjunctiva of the eye. This can be caused by hanging, smothering, strangulation, asphyxia.
7. **Cut/incised wound:** a wound caused by a sharp instrument or object (razor blade, knife). It has clearly defined borders.
8. **Laceration/tears:** tearing or splitting of body tissue (from being hit with a blunt object that breaks the skin).
9. **Paratracheal bruising:** paratracheal is within the neck. This injury is internal.
10. **Penetrating incised wound:** injury from knife, sharp glass going through layers of the skin into underlying tissues
11. **Petechiae:** burst capillaries (capillaries are small blood vessels). They are pin-point, round, non-raised spots caused by haemorrhage (bleeding).

They can be found anywhere on the face or mucosa. This is a good sign of asphyxia.

12. **Scratch:** superficial abrasion that is long and narrow (such as from fingernails).
13. **Smothering:** asphyxia (loss of oxygen) caused by blocking of external airways (think of putting a pillow on someone's face to stop them from breathing).
14. **Strangulation:** compression of the airways. This can be caused three ways:
  - a. **manual** (throttling): by hands, legs,
  - b. **ligature:** by rope, shoe lace, etc.
  - c. **mechanical:** hanging.
4. **Subconjunctival hemorrhages:** bleeding in the eyes.
14. **Suffocation:** obstruction of the upper airways.<sup>288</sup>

\* \* \*

The extent of these injuries indicates a level of violence, much of it gratuitous, *additional* to that involved in non-consensual sexual penetration. These women and children were bitten, choked, beaten and stabbed. Putting aside for the moment the allegation of rape, such injuries would in themselves result in a charge of serious assault or even attempted murder. As with the issue of statutory rape, the question then becomes whether other additional charges should be laid along with the rape charge. This would serve the pragmatic purpose of ensuring a conviction, albeit not for the rape.

#### CONDOM USE

When it comes to prosecuting rape, the question of whether a condom was used is an important evidentiary matter. There is a possibility that the condom can be secured and tested for semen residue or, where it is not used, that the semen residue in the complainant can be tested for DNA. Although negotiating condom use with a potential rapist could be seen as an indicator of consent, most people should recognise it as a potentially life-saving act of self-preservation. This is particularly true in a country like South Africa, where one in seven people is infected with HIV, and forced unprotected sex can be a potential death sentence.<sup>289</sup> This information was only collected in the Western Cape, where only 14 cases contained an indication that a condom was used. Of the remainder, in

seven cases it was unclear and in 111 cases (84 per cent) the complainant either stated or it was clear from the circumstances that no condom was used. Not one of the 14 cases in which a condom was used referenced the collection of the condom for evidentiary purposes.

## Context of the offence

### WHERE THE OFFENCE OCCURRED

Given the relatively high prevalence of stranger rapes, it will perhaps be surprising to see that 30 per cent of the Western Cape rapes occurred in the suspect's home. A further 14 per cent occurred in the complainant's home and 8 per cent in a shared home. The homes of the complainant and perpetrator, or their shared homes, were the scenes of more than half of the offences. In KZN all three cases involving current boyfriends and all but one of the five involving an ex-boyfriend occurred in the suspect's home. So too did 56 per cent of the acquaintance rapes. In total, 39 per cent of rapes in the KZN jurisdictions occurred in the suspect's home.

These findings need to be read against the narrative accounts detailed in the chapters that follow. They show that the incidence of rape reported as having happened in the perpetrator's home is less reflective of the relationship between the complainant and perpetrator and more indicative of the relative impunity with which rapists operate. It also needs to be read in the context of the fact that 26 per cent of the Western Cape complainants and 37 per cent of KZN complainants (including 17 of the cases where the rapes were perpetrated in the suspect's home) were abducted to the place where they were raped. Fourteen of the Western Cape complainants were held hostage for a period ranging between six hours and six days. Ten of the Western Cape cases involving abductions were reported at Ocean View Police Station (accounting for 19 per cent of all rapes reported at that station). In 35 per cent of the Western Cape and KZN cases rapes were reported as having been perpetrated in a public open space or building. In 44 per cent of the KZN cases the victim was accosted while walking to school, home or the shops. This includes 10 of the 16 acquaintance rapes and 11 of the 20 stranger rapes. Only nine of the KZN rapes occurred in the victim's home or one that



was shared with the perpetrator. Of those, two involved a home invasion by strangers and three involved family members. One of the victims was two years old and raped by her uncle.<sup>290</sup>

#### DAY AND TIME

Most rapes in the Western Cape (60 per cent) were perpetrated over the weekend, with just over half that number occurring during the week. Perhaps not surprisingly most of the rapes occurred at night, with 68 per cent occurring between 6pm and 6am. Forty-three per cent of the total rapes happened after 10pm. Six were recorded as 'ongoing', where there was indication that the complainant had been raped over a period of years, and in a further three the information was not recorded in the docket. This data was not collected in KZN.

#### ALCOHOL AND DRUG USE

The complainant's precipitating behaviour is often cited as a reason why rape cases fail in the criminal justice system.<sup>291</sup> Alcohol and drug use play a major role in this regard, with research showing that women's claims of sexual victimisation are less likely to be believed if they were drinking at the time of the alleged rape, and particularly if they were drinking with the perpetrator.<sup>292</sup> Studies in social psychology have shown that such victims are also perceived to carry greater responsibility for their victimisation.<sup>293</sup> While alcohol use can be viewed inappropriately as impacting on the complainant's credibility or character, Lievore also makes the important point that it may be viewed as problematic because it impairs the complainant's ability to reliably recall and recount the facts of the assault.<sup>294</sup>

I noted any indications of alcohol and drug use (in all cases methamphetamine, colloquially known as tik), but the docket does not necessarily capture this information, which means that the extent of alcohol use is probably under-represented. In particular, there is very little information about the extent of intoxication.<sup>295</sup> There is therefore no way of consistently distinguishing from the docket contents between a complainant who had one drink with a perpetrator whom she met briefly before the rape and another who was severely intoxicated.

Twenty-eight per cent of the Western Cape cases and only 8 per cent of the KZN cases contained some indication that the complainant had

been using alcohol directly prior to or at the time of the offence. This was generally recorded in the complainant's statement or on the medical examination form. Sometimes it was recorded in the investigation diary, although I treated this *post facto* assessment by the detective with caution if there was no other indication of alcohol use in the docket. It was also recorded, sometimes for the first time, on complainant withdrawal statements. The CIAC analysis showed similar numbers for alcohol use among rape complainants in the Western Cape (30 per cent), as did Mistry et al. who found alcohol levels of 25 per cent in the case of perpetrators and 33 per cent in the case of complainants.<sup>296</sup> Only four cases (all from one police station) indicated that the complainant had been using drugs (although other cases referred to the complainant as a 'drug-head' or mentioned that she is 'always using drugs'). Sixteen Western Cape cases made reference to the complainant and perpetrator drinking together at the time of or directly before the offence. Of the Western Cape cases, 30 referred to the perpetrator using alcohol, while 12 referred to the suspect's drug use.<sup>297</sup> Only 6 of the 69 suspects in the KZN cases were noted as having used alcohol. None were recorded as using drugs.<sup>298</sup>

## The investigation

Because rape cases are so reliant on the testimony of victims, consistency and corroboration are key elements in the construction of a strong evidentiary record. Her statement must be accurate and complete so that there are fewer inconsistencies for the defence to assail and more circumstantial information that can be corroborated to support her credibility in general, even if there were no witnesses to the offence itself. In the ordinary course of events, one would therefore expect to see at least a complainant statement, medical report and first witness report in a rape docket. The presence of these statements also provides a broad indicator of the effort put into an investigation.

### REPORTING

Prior research suggests that case withdrawal might be associated with reports made on behalf of the victim. The proxy then either inadvertently

misrepresented the facts of the assault, so that, for example, anal penetration (legally speaking an 'indecent assault' at the time of the Western Cape study) was reported as 'rape' and later re-classified, or made the report against the wishes of the complainant.<sup>299</sup> The question of who reported the case was therefore included in the data collection. Four out of five Western Cape cases and 70 per cent of the KZN cases were reported by the victim. Mothers and other family members accounted for the next highest number of people making reports, which is not surprising given how young some of the victims were.<sup>300</sup>

#### FIRST WITNESS REPORT

The evidence of the 'first witness'—the person to whom the complainant first reported the offence—is a critical aspect of the rape trial. Although the 'hue and cry' rule of received English common law, requiring evidence that the victim had loudly and publicly lamented her sexual violation, has been thoroughly discredited, the circumstances under which she first reported the offence and the contents of that report remain an important corroborative element, reinforcing the veracity of her claim, which may be admitted at trial.<sup>301</sup> Unfortunately, the lack of such a complaint can also be seen as an indication that the offence was not committed or had little impact on the victim, even where there are laws in place to specifically exclude such inferences.<sup>302</sup> It is therefore extremely problematic that 50 per cent of the Western Cape dockets contained no first witness reports. This data was not collected in KZN.

#### OVERSIGHT

As a first step in assessing whether there was oversight of detectives and the involvement of the prosecution, a simple count was made of whether there were 'notes' from a supervising officer in the docket, as well as from the prosecutor, where the docket was referred for a decision. In the Western Cape, only five cases did not contain any notes from a detective commander, with 96 per cent containing such instructions. Prosecutorial involvement was less prevalent, with 45 per cent showing some indication of prosecutorial involvement (very loosely defined to include any indication that the prosecutor had perused and commented on the docket). The remaining 55 per cent showed no substantive interaction between

either of these parties, although the prosecutor may have made the final decision to close the docket *nolle prosequi*.

### Rethinking real rape

It has become axiomatic that the police only treat 'real rape' seriously.<sup>303</sup> The work of Estrich, Kelly and other scholars and activists has provided a compelling picture of the ways in which the police (and criminal justice systems more generally) have tended to ignore rapes that are not stereotypically 'serious'. Although later scholars have sought to develop more nuanced profiles of rape cases that will or won't succeed, the 'real rape' model has retained remarkable traction. It is randomly appropriated, across differing social and institutional contexts, as an easy catch-all to describe the stereotypical bases upon which decisions are made to exclude certain kinds of rape cases. But it seems obvious, and the chapters that follow support this contention, that the threshold of what constitutes a 'real rape' will be different in contexts where the cultural and normative dimensions of appropriate sexual conduct are more accepting of violence and coercion. This is even more true when there is a pervasive belief that violence is a way of life for some communities and that 'therefore, women who are members of these "violence-prone" groups will not be as traumatised by rape or battering as other women.'<sup>304</sup>

Consider again the profile of the cases in this sample. A substantial number of the cases involved girls under the age of 16 years (30 per cent in the Western Cape and 37 per cent in KZN), with nearly half of that number being under the age of 12. The majority of victims were raped by a stranger or a near-stranger (someone with whom they were acquainted or knew by sight): 58 per cent in the Western Cape and 78 per cent in KZN. No fewer than 23 per cent of the Western Cape suspects and 19 per cent of the KZN suspects had been previously charged with an offence. Of those suspects, in the Western Cape two-thirds had been charged with violent crimes, including rape, murder, attempted murder, assault and contravening a domestic violence protection order. Just over a quarter of the Western Cape victims (26 per cent) and more than two-thirds of the KZN victims (39 per cent) were abducted to the place where they were raped. Fourteen of the Western Cape victims were held hostage for

a period ranging from six hours to six days. Ten of the cases involving abductions were reported at Ocean View Police Station, accounting for almost one out five rapes reported in that precinct. More than a third of both the Western Cape and KZN rapes occurred in public open spaces or public buildings. More than half of the Western Cape victims suffered genital injuries—and half of those victims also experienced other physical injuries.

The critical aspect of rape in South Africa that is of particular concern and seems to confound any recourse to notions of 'real rape' is the extent of violence and injury accompanying the sexual assault. What is considered 'normal' or 'typical' sex—and so the division between good sex and bad sex, bad sex and rape—is very much bound to social context. The stock 'real rape' variables don't transfer neatly to a country, such as South Africa, where the levels of rape, and the brutally gratuitous violence accompanying it, are extraordinarily high. Looking at the facts of the cases described in the chapters that follow, it seems that the bar is raised. Normal sex in an abnormal society comes to be typified in ways that incorporate a level of violence and a degree of compulsory access to women's bodies that might be less tolerated in contexts that are less generally violent. This is not least because the police are so immersed in the day-to-day violence perpetrated by South Africans against each other, that they are inured to all but the most egregious manifestations of sexual violence.

## CHAPTER 5

# Recalcitrant Victims

Recalcitrant: uncontrollable • intractable • unmanageable  
• wayward • wilful • contrary

When a rape complainant reports to the police she is vetted. This does not happen formally—it is exactly because it is often hidden that it is so problematic—but both her credibility and the validity of her claim are invariably assessed before she gains ‘access’ to the criminal justice system. This is a formidable entry barrier, which studies have shown to be informed by normative conceptions about the nature of sexual victimisation and the type of person who can legitimately claim to have been raped, as much as they are by evidentiary and procedural concerns.<sup>305</sup>

On the analysis of scholars writing in the North American and English contexts, sexual violations that are most likely to enter the system and be successfully prosecuted are those involving weapon use and injury, perpetrated against a sexually inexperienced woman by a man she did not know.<sup>306</sup> The closer the conformity between criminal justice agents’ perceptions about what constitutes ‘typical sex’ and the alleged rape, the less likely there is to be a conviction. ‘Typically’, sex does not involve the use of a weapon or injury to either party, although it may involve overcoming a certain amount of ‘reluctance’ on the part of the woman.<sup>307</sup> While it is likely that the obviously discriminatory aspects identified by earlier scholars have been tempered over the past decades, more recent studies show that normative conceptions of appropriate sexual and social conduct continue to inform criminal justice decision-making, albeit in a more fragmented manner.<sup>308</sup> *Who* the victim is, remains as important as *what* she tells the police when it comes to assessing her credibility.<sup>309</sup>

In this chapter I look more closely at police claims of victim recalcitrance, focusing on the decision to report and the subsequent expectations that police have of victims, as manifested in police dockets.

I move beyond the question of whether a complainant is credible, in the sense of being a 'good victim' or a 'bad victim', and suggest instead that convincing the investigating officer of her own integrity and the validity of her claim when she reports the rape is only the first hurdle for a complainant. Once the investigation is initiated a complainant must also continuously act in a way that convinces the investigating officer of her ongoing interest in the case. This includes regularly soliciting feedback on the status of the investigation, being available to the investigating officer, and even participating in the apprehension of the perpetrator. What has been conceptualised, therefore, as the 'gateway' to the criminal justice system comes to be seen more as a 'gantlet' through which the complainant must pass in order to access the courts.

## Reporting rape

The victim's decision to report being raped to the police is generally identified as the most quantitatively significant attrition point in the criminal justice process and also the one that is most difficult to estimate.<sup>310</sup> Early claims by South African advocacy organisations that only one in 35 rapes was reported to the police, and the associated extrapolation that a rape was committed in South Africa every 26 seconds, were met with vehement denials by government officials. In 2000, then Ministers of Safety and Security, and of Justice and Constitutional Development, Steve Tshwete and Penuell Maduna, were interviewed on this point in Johannesburg by American broadcaster, CBC. Asked to comment on South Africa's rape statistics, they retorted that 'You've been standing here for more than 26 seconds. Have you seen anyone raped in that time?'.<sup>311</sup> Thabo Mbeki, then State President, also weighed in angrily on the subject of rape statistics and the claim that South Africa had a 'culture of rape'.<sup>312</sup> At the same time, a national Victims of Crime Survey conducted by Statistics South Africa found that as many as one in two rapes was in fact reported.<sup>313</sup> This figure was equally disputed, on the grounds that a general crime survey was unsuited to investigating the specific, and very private, issue of sexual victimisation.<sup>314</sup> In a small 1998 survey 69 per cent of respondents said that they had reported being raped to the police.<sup>315</sup> But, just as victimisation surveys are marked by

under-reporting, it may be that surveys of reporting rates (and other help-seeking behaviour) are biased by over-reporting. Respondents may exaggerate the extent to which they have engaged in help-seeking behaviour, based on what they think the interviewer will consider to be an appropriate response to their victimisation. In other words, people exaggerate the extent to which they did 'the right thing'.<sup>316</sup> The small, geographically specific sample also makes this estimate unreliable. The most recent research on this topic, conducted by the Medical Research Council in three provinces, has suggested a reporting rate of around 1 in 9 rapes.<sup>317</sup> As the first, representative, community-based, gender-based violence prevalence study conducted in South Africa it is the most reliable estimate of reporting rates. It has therefore been widely accepted in advocacy circles, and even adopted as the basis for a remarkable campaign supporting rape survivors, the One in Nine Campaign.<sup>318</sup>

#### WHY DO COMPLAINANTS REPORT — OR NOT?

While the decision whether or not to report a rape is undoubtedly a complex and very personal one, studies suggest that criminal justice performance and attitudes play a critical role. Reasons for reporting range from doing so 'automatically' or at someone else's insistence, wanting to prevent attacks on others or further attacks on the complainant, and a desire for 'justice', to factors directly associated with the nature of the attack.<sup>319</sup> Here the severity of the assault and the relationship between the victim and perpetrator have been found to be particularly relevant, with victims more likely to report rapes that are accompanied by force and perpetrated by strangers. This ties in with evidence that suggests better treatment at the reporting stage for women who have been subjected to more serious or 'real rapes'.<sup>320</sup> However, a recent Canadian study by Du Mont et al. suggests that these 'real rape' characteristics alone do not determine whether a rape will be reported or not. They speculate, correctly I think, that this divergence from prior studies may reflect an increasing sense of entitlement to police services from previously marginalised women and the effects of rape law reform and social-context training in sensitising police to atypical rape scenarios.<sup>321</sup> Finally, a number of studies have found that the extent of the victim's social support networks is especially important in supporting her to make



a complaint in the first instance and thereafter to follow it through the criminal justice process.<sup>322</sup>

Despite disputes about the extent of under-reporting, reasons for non-reporting have been fairly well documented in international literature on rape.<sup>323</sup> A number of scholars have identified the initial interaction with police as particularly problematic from the victim's perspective. Reviewing various UK studies, Kelly identifies four predominant themes: the manner of police officers; disbelief; feeling blamed; and being asked the same questions repeatedly.<sup>324</sup> Other reasons include guilt, self-blame and shame, often linked to the victim's own ambivalence about whether she was in fact 'raped', both in terms of her own experience and as a matter of social and legal construction.<sup>325</sup> For many victims this translates into a wish to keep the rape 'private' or even a complete denial of their victimisation. Often the reasons cited mirror those that support reporting. In this regard, studies suggest that concerns about police attitudes and competence prevail. While one victim may therefore report being raped because she wants to prevent others from being victimised or wants to see the perpetrator punished, another may desist from reporting because of a belief that the police won't do anything about it.<sup>326</sup> As a result, Brown et al. emphasise that: 'A cyclical process is liable to occur ..., with the high attrition rate at court discouraging victim reporting and participation, which in turn impacts further on the attrition rate'.<sup>327</sup>

On one level the belief that the police will not act is informed by perceptions of their competence and ability to produce desired outcomes. In a country like South Africa, where police incompetence and corruption are routinely exposed and widely publicised, this is an obvious disincentive to reporting. On another level it reflects a view that rapes—particularly certain types of rape—are not taken seriously by the police. On this account, victims do not report being raped because they do not think the police will believe them, based on prior personal experience with the police, the experiences of others or what is reported in the media.

Victim perceptions that the police won't act on rape complaints are as much influenced by self-assessments of validity and credibility as they are by considerations of how the police will respond. Sometimes these perceptions reflect the victim's own ambivalence about whether her experience validly amounts to 'rape'—as either normatively distinct

from 'bad sex' or as a proscribed criminal offence. This is informed by her own view of whether she conformed to stereotypically 'appropriate' behaviour at the time (for example, whether she resisted and whether she adequately conveyed that she didn't want to have sex). It may also be influenced by her fear that the context in which the rape occurred undermines her credibility. Her relationship with the perpetrator, the nature of any apparently precipitating behaviour on her part (previously having sex or going on a date with him, drinking, flirting, accepting a ride home, wearing revealing clothes, walking home alone late at night—the things that we are told that 'good girls' don't do, particularly if they don't want to get raped), and her conduct after the rape, all come into play in this assessment. Having internalised widely held notions of what constitutes a 'good victim', victims fear being disbelieved and blamed for their own victimisation. Fear is a potent disincentive to reporting sexual victimisation: fear of retaliation by the perpetrator; fear of approbation from family, friends and community; fear that the offence will be made public; fear of the police and court process and uncertainty about how she will be treated.<sup>328</sup>

#### INSIGHTS FROM RAPE VICTIMS

Victims who receive counselling at Rape Crisis are asked whether they have reported to the police. Many talk about their experiences with the police. Of the 591 client records received from Rape Crisis that directly referenced the criminal justice system, 234 indicated that the victim had not reported the crime. Seventy-four provided no reasons, but the remaining 160 cases provide useful insights into reasons for not reporting. No inferences can be drawn about reporting rates in general, as the records were incomplete and in a number of instances no mention was made at all of whether the survivor interacted with the police or not.

#### FEAR AND INTIMIDATION

Thirty-eight of the women seeking counselling from Rape Crisis said that the reason they did not report to the police was because they were too afraid of the perpetrator. In the majority of these cases he had threatened to kill her and in a number of cases the threats appeared to be ongoing. For example, in a case where the victim and a friend were both raped, it was recorded that 'she was too scared (because) the gangsters

kept threatening to kill them'. Half of these cases made reference to gang involvement, lending support to police claims that gang intimidation more often results in cases not being reported at all than in subsequent withdrawals.<sup>329</sup> Fears of further violence and retaliation by the perpetrator are widely identified as preventing victims from reporting. Given the violence already perpetrated against them, this fear is not surprising. As psychologist, Judith Herman points out:

Perpetrators of sexual ... violence have intimate knowledge that makes it very easy for them to threaten or discredit their victims. To a victim who has already been terrorized and humiliated, the routine procedures of the legal system do not offer much reassurance. Although intimidation of a witness is nominally criminalized, the state offers little in the way of practical protection.<sup>330</sup>

In a context like South Africa, where the violence of the rape is more often than not accompanied by additional acts of physical violence, the perceived threat of further violation is even more potent. In communities that experience high levels of gang activity, escaping this threat is almost impossible and providing adequate protection a daunting challenge for the police. The insidious nature of gang rape can reflect the same kinds of intimacy as intra-familial rapes, in terms of dependency on the perpetrator, the inability to escape, and the perpetrators' bonds within the community—even where these are based on fear. Reporting such a rape means weighing up the certainty of violence, intimidation and community pressure against the possibility that the police will be able to provide protection and the courts redress. These choices are inevitably juxtaposed in victim responses: 'scared of the threats and has no trust in the police' is a typical entry. Even the most effective police service can offer only limited protection in such cases. What can be effectively dealt with is the following: 'afraid to report because the perpetrator is a police officer'. Three entries expressed similar sentiments.

#### FAMILY/COMMUNITY PRESSURE

Family and community support is one of the strongest indicators of whether a victim will report being raped—and of whether or not she will later

withdraw her complaint. This was identified in the Rape Crisis records as a key reason why women did not go to the police, with 26 victims citing it as a reason for not reporting. In some cases the pressure was perceived: victims chose not to report because of the assumed impact this would have on others, while in other cases the victim was specifically asked not to report by a friend or family member. In a number of cases the victim indicated that she did not report because she was 'too scared of the effect on her mother' or 'scared of what her mom would think'. In one case the victim did not report 'because she was frightened of her father'. Another chose not to report because she 'didn't want the church to be involved in a scandal'. Cases where the victim was directly pressured not to report were far more prevalent. Typically, the entry would indicate that 'her family is against her laying charges' or that a specific person (her aunt, her mother) had told her not to report. In one case the victim said that, on top of the family pressure, the police had told her when she reported that she had a weak case, with the result that she had not followed through. A number of victims indicated concern for the perpetrator, along the lines of 'she doesn't want to ... ruin the perpetrator's and his family's life' and 'the perpetrator's father was worried that his son might end up in jail and be abused'. In another case the victim was concerned that the rapist's family would 'suffer if he went to jail'.

The perpetrator's status seemed to be a complicating factor for victims, who cited as reasons for not reporting: 'the rapist's connection to her father's firm'; or his status as a police officer, teacher or church leader; as well as familial links. Ironically, it is probably exactly this professional or personal relationship of the perpetrator to the victim (such as 'my best friend's husband') that provided him with access to the victim in the first place. Only two of the cases clearly related to an ex-husband. In the first case he was described as an 'abusive man' whom she did not wish to 'further antagonise'. In the other case where an ex-husband is mentioned, it is not as the perpetrator, but still as the reason for not reporting, the client expressing her fear that if he found out about the rape he would 'get custody of her kids'.

## CONCERNS ABOUT THE POLICE

It is interesting that very few complainants—only seven—expressed concerns about reporting the rape to the police *per se*. For most victims the reasons appear to be deeply personal, rather than primarily based on concerns about police competence. In one case the victim had reported being raped to the police five years before, and had such a negative experience that when she was later raped again she was not prepared to report it. Others referred to a lack of ‘faith in our justice system’, views that ‘the police were incompetent’, a lack of ‘trust’ in the police, fear of ‘abuse by the police’ and the view that ‘nothing would be done against the perpetrator’.

## SHAME AND SELF-BLAME

One of the reasons why it is difficult to estimate non-reporting levels is that many victims not only do not tell the police about their victimisation, but do not tell anyone.<sup>331</sup> To quote Judith Herman again:

Crimes of dominance have a ritualised element designed to isolate the victim and to degrade her in the eyes of others. The crime is intended to defile the victim, so that she will be publicly stigmatised and scorned should the crime be disclosed. It is this dishonoring of the victim that renders crimes of sexual ... violence so intractable and so impervious to the formal remedies of law.<sup>332</sup>

Twenty-five victims said they had not reported being raped because they were too ashamed. In some cases, before coming to Rape Crisis, the victims had not told a single person for years, because they were too ashamed or afraid of the impact that it would have on those close to them. They didn’t want ‘people’ or their parents (particularly their mothers) or boyfriends to know. A number said that they were ‘too ashamed to tell anyone’, many because they felt it was their fault or blamed themselves. One victim only told her grandmother when she found out that she was pregnant. Another wrote about being raped in her diary, which her mother found and read.

## WAS IT A CRIME?

There is a pernicious nexus between self-blame, concern that no one will believe you, and the question that many victims face of whether what happened to them—this violation of their physical and psychological integrity—was ‘rape’, both as distinguished from ‘bad sex’ and as something defined in that way by the criminal justice system. Ten victims said they had not reported because they were not sure if it was ‘rape’ or that the evidence was strong enough. For example, one victim reported that she ‘didn’t think it was rape at first because the perpetrator was her boyfriend’. Another reported that at the time she was ‘not sure it was rape’, and yet another that she was ‘confused and had mixed feelings about it’.

Others go further and make their own assessment of the evidence and of their perceived credibility. For the most part these cases involve the victim having used alcohol or drugs: ‘she felt guilty about letting herself get drunk and did not feel she had a strong case’ or she ‘didn’t report because she had taken drugs’. In a number of other cases it was merely said that she had not reported as ‘there was no evidence’. In one case the victim explained that she had not reported because ‘she did not know the perpetrator’s surname’. As I describe further below, providing the police with ‘evidence’ is an important means of ensuring that a claim of rape is treated as credible and valid. One victim reported that she had filed complaints for assault and malicious damage to property (both of which she could prove) ‘but fears she won’t be believed if she reports the actual rape’. It would be better to have the victimisation go unpunished than to take the risk of it being officially invalidated, especially when already ‘the perpetrator told her no one would believe her’.

## OTHER REASONS

Rape inserts itself into a person’s life, amidst all its existing complexities. Dealing with the effects of this violation is a deeply personal process, informed as much by that context as by the need to seek justice.<sup>333</sup> Many people in South Africa live extremely marginal lives, surviving from day to day in difficult environments. Cases captured in the ‘other’ category ranged from practical ‘access to justice’ issues (‘didn’t have transport to go to the police station’; ‘didn’t know how to report it’; ‘chose to report to the Street Committee instead of the police’) to formidable psychological

barriers. Victims reported that they had been 'in a state of denial', 'did not want to relive the rape', and 'felt too much was expected from her at the time'. A number said that they already had 'too much to deal with'. One had a psychotic episode after the rape.<sup>334</sup> Only one person said she had not reported because she still had 'feelings' for the perpetrator. Four victims chose not to report because they had obtained domestic violence protection orders against the perpetrator, suggesting that safety was their primary concern and that—for the moment at least—they felt that this had been achieved.

### **What do police expect of complainants?**

Once a victim decides to report she subjects herself to the scrutiny of the criminal justice system and the expectations of those working in it. The cases suggest that the police have four key expectations of how a victim will comport herself once a docket has been opened. She should actively follow up the case, assist in the investigation, be available, and provide reliable and consistent information. On the face of it these expectations seem quite reasonable. In practice the determinant effect of perceived recalcitrance on the part of the victim makes these expectations very problematic. The ironic effect of non-performance on the part of the police and heightened expectations of victims is that rape prosecution in many cases comes to rely on victim-led investigations. Credibility is never established. Instead it is the key variable in an ongoing process of asserting the validity of a victim's claim upon the criminal justice system. As more than one detective put it, 'If I lay a charge, I must show an interest.' It is thus the victim's actions, or her failure to act, during the course of the investigation that determines whether she is worthy of protection.

#### **FOLLOW-UP**

Police expect complainants to follow up regularly on the progress of their cases. Although the SAPS National Instructions dictate that the detective must keep the complainant informed, in practice it seems generally to be the complainant's responsibility to stay in contact.<sup>335</sup> This observation supports earlier evidence from Barday and Combrinck's study into the operation of bail laws in sexual offences cases. A detective

interviewed for that study told the writers that at his police station a '7 day rule' applies: complainants are warned that they should make contact with the investigating officer within 7 days of making a rape complaint to confirm that they wish to continue with the case. If they did not do so, the case was closed 'without further attempts to investigate or follow up on the complaint'.<sup>336</sup> Although none of the dockets that I saw were that explicit, the general assumption certainly seems to be that complainants who do not follow up on their cases are not serious about prosecuting and therefore not worth the effort required to mount an investigation. Consider, for example, a case in which the perpetrator was caught at the scene after the victim frantically flagged down a police patrol van. The suspect claimed that the complainant had offered sex in exchange for money. When she saw the police van, he claimed, she suddenly began to shout 'help, help he's raping me'. 'I got such a big fright I ran away,' he explained in his statement. Per the detective, justifying the closure of the case just days after it was opened:

Since the opening of this case I did notice that the complainant is not interested in the case ... if this matter was so important to them why didn't they come and see or phone me.

As a prosecutor pointed out, complainants do not necessarily see things this way:

*Many rape victims don't understand what the service should be like. To them, they were raped, they complained to the police, it's now in the system and somebody will take care of it. They don't understand that they need to go back and follow up if they haven't heard more about the case ... If you know your client's never going to complain about your shoddy work then give him shoddy work. If you know your client's going to make a fuss you'll think twice.*

Similar comments were made by the prosecutors and magistrates I interviewed in a 2003 study, who said flatly that police respond to



'whoever yells the loudest'. According to them '[t]he women who get their cases attended to are the ones who show up at the station and demand it.'<sup>337</sup>

### INVESTIGATION

The dockets show that a complainant may be required to assist in the investigation of her case. In some cases, this is a prerequisite for even laying a complaint. A victim seeking support from Rape Crisis was told by the police that they would not open a docket as she did not know what the men who raped her looked like. The dockets that were opened tell us that complainants may be expected to identify further suspects and to find out where they live, to rally witnesses and to 'point out' the perpetrator to the police. Those who do not are 'not interested' in the case.

In one case three men dragged the victim into the bushes. Two of them were disturbed and ran off. The third, known to the complainant by sight, stayed behind and raped her. The medical examination confirmed 'definite trauma to the vaginal area' and signs of serious physical assault, including bruises and scratches on her face, neck, shoulders, upper chest, lower arms, lower abdomen and inner thighs. She immediately reported the rape to the police. The detective noted in the investigation diary that he had given his phone number to the complainant and asked her to find out where the suspect lived. She was instructed to call him if she saw the perpetrator 'as he is unknown to the investigating officer'. Two months later the detective deposed an affidavit saying that he'd spoken to the complainant and that she had not seen the perpetrator since the day of the rape. In the meantime, he wrote, she had not once come to ask about her case. He concluded that:

... it appears as if she doesn't really have any interest in the case.

The case was closed on this basis with no further recourse to the complainant.

There is an ingrained scepticism regarding rape complainants and an ongoing need for them to affirm the validity of their claims and their credibility as complainants. Take, for example, a case which was closed

only 26 days after it was opened. The complainant had gone home with her boyfriend from a pub at about 10pm. They had consensual sex and went to sleep. A short while later she heard people at the door. Her boyfriend opened it and let in three of his friends. One immediately came over to the bed and raped the victim, while the others, including her boyfriend, watched. When she called out to her boyfriend for help, he said that she was used to sleeping around with other men and should stop complaining. All three raped her. After her boyfriend left with one of the men the remaining two raped her again. The medical examination concluded that she was recently sexually assaulted.\* After the rape was reported on 10 April, the detective left a 'point out' note at the complainant's home.

A 'point out' note requests a police officer not necessarily involved in the case to arrest a suspect when the holder of the note points him out to the police. It provides the probable cause upon which a police officer may effect a lawful arrest. In practice, its effect is to serve notice on the complainant that she is required to 'point out' the perpetrator to the police. On 6 May the docket was closed with the following annotation:

The victim has ... not contacted me to arrange pointing out. Victim is never at home, therefore it seems like the victim is not interested in the case anymore.

Rape as a form of punishment for perceived infidelity is not uncommon—in fact it is one of the more brutal ways in which social control is exercised over women's sexuality. Rape is used in this context to punish women for their insubordination and to defile them, to put them back in their place and to diminish their chances of forming an intimate relationship with another man.

For those who understand the forms that rape takes in South Africa, the description of events contained in this file is credible, particularly when coupled with the findings of the medical examination. What the

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\* Finding tears, laceration, dry material on external vulva/perineum, and swelling, and concluding 'recent sexual assault as evidenced by physical exam'.

investigating officer requires of the complainant is that she 'points out' to the police the perpetrators of the rape, none of whom she knew. This requires her to find out who they are and where they live, when the only person who possibly has this information is her boyfriend, a party to the rape. She is expected to do this in the three weeks following a brutal gang-rape, an act of unimaginable aggression, which is compounded in that it was facilitated by a man with whom she was in an intimate relationship. This is the only way that she can 'prove' herself to be a credible complainant, worthy of police efforts. It is a formidable test. For a rape victim, if she does not come through with the information, it is because she is not serious about the case or because she is lying, and not because she does not have the capacity—emotionally or practically—to investigate her own rape. In any event, detectives don't expect to hear back from complainants. Point-out notes are a useful way of doing something in the investigation without doing anything.

The investigation diaries reveal a consistent thread of scepticism that runs through many of the cases. Detectives question why complainants cannot identify the perpetrator, or the vehicle involved, or the site of the offence. In the case of a woman who was raped at knifepoint by two strangers who broke into her house while she was sleeping, the detective questioned, for example, why she could not identify the perpetrators. After all, she spoke to them, asking to use the toilet, from which she escaped through the window. Another detective questioned why a complainant was not able to memorise the registration number of the vehicle from which she was thrown naked after she was abducted and raped at gunpoint.<sup>338</sup> These details are crucial to the investigation—less so to victims who are simply trying to survive.

#### AVAILABILITY

Detectives expect complainants to be available. This means being at home when they visit or being on the other end of the phone when they call. Failure to be available elicits extremely strong reactions from detectives. Although not intrinsically problematic—after all, if we are asking the police to stay in contact with complainants it would be useful if complainants were contactable—the assumptions that are made about when and where people will be available and the reasons that they are

not, are of concern. This is illustrated in the case of a woman who was raped by a stranger: three weeks after the rape was reported, the investigating officer noted in the investigation diary that he had visited her home 'on numerous occasions', but that she was never there. Two months later he tried to visit her again, but she was not at home. He stated, on this basis, in an affidavit supporting the closure of the docket that 'It seems as if she is not interested in this case'. What the affidavit did not reflect, but was apparent from the complainant's statement, was that she was employed and that his three efforts to visit her at her home, as recorded in the investigation diary, were all made during work hours. It was therefore unlikely that she would be at home. In another case, an appointment was made by the detective for the complainant to see the prosecutor in his office at 4pm. The complainant was notified of this by a message left on her answering machine, when her victim statement clearly stated that she worked until 6.30pm. Tenuous job security means that taking time off from a job, essential for sustaining some kind of livelihood, is extremely problematic for many women. Faced with a choice that paid no attention to her constraints, a complainant might decide to forego the costs of engaging with the system.

It is not only expected that complainants will be readily available, but also that they will remain at the place they were living when they were raped and that they will inform the police when they move. The former expectation is unrealistic given both what we know about how rape complainants work through trauma and the structural instability of many poor communities. The latter expectation seems to be reasonable, but something that complainants do not routinely communicate. The cases suggest, however, that this breakdown in communication is reciprocal, possibly leaving complainants believing that it is the police that are not interested in the case. It is also arguable that if detectives were in closer contact with the complainants whose cases they were investigating they would have better knowledge of their plans to leave the area. Thirteen of the Western Cape cases (10 per cent) and fifteen of the KZN cases (24 per cent) were closed because the complainant could not be traced. In most of the cases it was clear that there had been no contact between the investigating officer and the complainant for a period typically ranging from three to nine months.

Most of the cases in which the complainant could not be traced showed lengthy breaks in communication between the investigating officer and the complainant. In one case it took the detective 10 months to contact the complainant, at which time he concluded that her address (given only as a shack number, with no street name, in Masiphumelele) did not exist. The case was closed on the basis that the complainant could not be traced. A prosecutor reinforced the link between long delays and high withdrawal rates, saying that

*... the longer the wait, the higher the relocation rate ... They move to the Eastern Cape ... and without the complainant we've got nothing.*

The SAPS Standing Orders on the Closing of Case Dockets require that in order to close a docket on the basis that the complainant is untraceable, her absence must be 'substantiated through affidavits by witnesses (neighbours, etc)',<sup>339</sup> and the 2008 National Instructions go even further to say that the supervising officer 'must satisfy himself or herself that the investigating officer has made every effort to trace the complainant or suspect [and] he or she must give clear instructions in the investigation diary to the investigating officer on the steps to take in order to trace the suspect or complainant and determine a date on which the investigating officer must present the docket with the outcome of the steps taken'.<sup>340</sup> Not one docket in KZN or the Western Cape contained any supporting affidavits. In one case the investigating officer said he spoke to the complainant's aunt who said 'she has left'. This was the first time anyone from SAPS had tried to contact the complainant in seven months, despite an affidavit from the arresting officer to the effect that:

*While I was busy interviewing the complainant and the witnesses he [the accused] was threatening the witnesses that he is going to kill them ...*

The complainant in this case was abducted off the street to the perpetrator's home and repeatedly raped until she managed to escape while he was sleeping. She immediately alerted the police, who found

the man still asleep in the shack. In the face of this brutality and the perpetrator's subsequent threats, it should not be surprising if the complainant sees the failure of the investigating officer to contact her as an indication that the state is not willing or able to protect her. For her own safety, relocation would be both sensible and necessary. Taking her continued safety into her own hands, there seems to be little point in conveying this decision to an apparently disinterested investigating officer. In another case, where the complainant was raped by her ex-boyfriend and the police called to intervene at the scene, her address was recorded only as Masemola Road (one of two substantial main roads in the area), with no house number, making it almost certain that she would not be traced at a later stage, which she was not. In a KZN case, the detective attempted to make contact with another 15-year-old complainant three months after she reported that she had been abducted and repeatedly raped over a period of six days. He found the family's homestead burned to the ground — 'set alight by unknown suspects' — and abandoned. The investigating officer found the girl's grandmother in a nearby town, but the victim had disappeared. Two years later, when the docket was finally closed, the girl was still missing.

Because the complainant has moved does not mean that she is 'untraceable', although this term is often used in such cases and it seems to be taken as a logical conclusion. Three unknown men broke down one victim's door and raped her. A passer-by, who heard her screams and came to her rescue, recognised one of the men and identified him to the police. From the investigation diary it seems that the police only attempted to arrest him, unsuccessfully, 19 days after the rape. They went to his shack again six weeks later, but were still not able to arrest him. In the meantime the complainant moved out of the area. When the investigating officer tried to make contact, for the first time, two months after the rape, her sister told the police she was gone. Some basic investigative work could have unearthed a family member or friend who knew where the complainant was. But the assumption that a complainant moving away means that she is not interested in the case militates against any effort to trace her.

## RELIABILITY

A number of dockets contained incorrect and incomplete contact information, making it impossible for the investigating officer to contact the complainant at all. Interestingly, instead of being viewed as a failure by the person taking down the information to correctly transcribe it and ensure its accuracy, this too is seen as reflecting on the reliability of complainants and the credibility of their claims.<sup>341</sup> This view was expressed by a detective, who explained to me that:

*... we sit with all these sort of cases [that have] wrong addresses and when you go, they say the person has left. And the contact number is wrong and the person is gone and you sit with the dockets. People must show that they are interested in the case and give correct information, but they never do. Most of the cases you see ... the victims just disappear. They are given letters to come back, but they never do. If you ask the victim why she did not come she will tell you that she did not want to waste her time ...*

The firmly held notion that substantial numbers of women would deliberately provide the police with false contact information after reporting that they were raped is bizarre. The alternative explanation—that shoddy statement-taking and clerical oversights are responsible for many of these errors—seems far more probable. During the course of the docket analysis, which involved going through the *entire* docket in some detail, I noted a number of cases where contact details were incorrectly transcribed from the complainant's statement to the investigation diary, most obviously missing a digit, or where all the details were not carried over. In those cases, for example, only the cellular telephone number would be copied over and not the work or home number. (It was sometimes tempting to call one of these 'lost' numbers and see whether an 'untraceable' complainant could be found with a little bit of effort). In one case the supervising officer picked up on this issue, responding to a statement by the detective, made in the docket six months after the rape was reported, that the complainant's address did not exist. He asks 'what about phone numbers?'. The investigating officer responds a week later:

'will phone the complainant'. A week after that the detective reported that the complainant 'is not interested in this case anymore'.

The possibility of corruption is always present. In some cases, anyone with a vague knowledge of the area would know immediately that the address given did not exist. Jonny Steinberg provides a troubling account of why this might be so in his study of policing in Alexandra. Interviewing a Neighbourhood Watch member, Steinberg questions the disparity between the number of suspects the watch claims to have handed over to the police and police arrest records. The watch member responds:

Some funny things have happened to some of our cases ... They [the police] have so many tricks ... If the witness lives at 25 Eighth Avenue, somebody will add a number to the address in the subpoena so that it says 125 Eighth Avenue. And so it is written on the docket 'Case dismissed: witness untraceable'.<sup>342</sup>

Ironically, the view that some complainants deliberately seek to frustrate their investigation of the case by providing false information is held tenaciously by police officers. One detective went so far as to say that complainants regularly give false names, as well as incorrect contact details. He explained that these were inevitably false complaints, in which the complainant wanted to make trouble for someone (the alleged offender) by reporting a rape 'anonymously'.

This criticism does not detract from the difficulties of policing informal settlements and other densely populated areas. Tenure is extremely insecure. Shack fires are a common occurrence, sometimes displacing hundreds of people. Securing a safe place to live becomes a priority. That may mean moving out of the area, as two of the complainants did when their shacks were burnt down, or moving to elsewhere within the same area. Either way, reporting this move to the police is not necessarily a top priority at the time. There is no question that tracking down complainants under these circumstances must be immensely frustrating for the police. It is also not uncommon for shacks to be poorly numbered, sometimes still reflecting the number that was allocated to it on the street where it was originally erected. One detective reported in this regard that:



I phoned the victim about the address and she told me that the suspect moved his shack. She don't know where he moved it to.

People live marginal lives: cellphones are stolen; there is no money for airtime or for electricity to charge the phone; they are evicted or lose their homes; tenuous jobs are lost. This should not matter in their quest for justice, but it does. It highlights the importance of police knowing the areas they serve particularly well and ensuring that landmarks and identifiers other than the physical addresses or cellphone numbers are taken down in the statement, including the contact details of family members.

Similar difficulties exist with tracking down identified suspects, although again a *laissez-faire* attitude appears to prevail. In one particularly striking case, where a woman was brutally raped by her ex-boyfriend, who also held her hostage for two days, the detective wrote in his investigation diary: 'I have visited the suspect's address a few times but could not find him'. Some months later a new investigating officer wrote: 'The address of the suspect does not exist'. This anomaly was never commented on by the detective commander or the prosecutor. Four months after the rape, an instruction was finally issued by the detective commander for the investigating officer to obtain an arrest warrant for the suspect, but was circumvented by a call to the complainant who (conveniently) said that she did not want to continue with the case.<sup>343</sup> The case was closed 'withdrawn complainant'.

At the same time, there are clear indications in some of the dockets of efforts on the part of the detective to trace the complainant over an extended period of time. In the case of a woman who was raped and indecently assaulted by five men, the detective initially went to the address given and was told that nobody knew the complainant. He persevered and two months later obtained an address for her, arranging for an identikit to be compiled by the complainant. A month later she had disappeared from that address—the residents telling the detective that they were also looking for her as she had stolen from them. Unfortunately frustrating and ultimately fruitless cases like this one tend to become the prototype, fuelling police contentions that 'Victims have the attitude of "I don't care what happened to me—I don't care about my body"'.

## Victim non-cooperation: The recalcitrance of youth

**Children** are particularly vulnerable to sexual abuse and exploitation. Thirty-nine (30 per cent) of the complainants in the Western Cape study were under the age of 16 years, as were 18 (32 per cent) of those in the KZN study. Of those complainants, 14 and 6 respectively were under the age of 12 years, accounting for around one in ten of all the cases. In KZN children under the age of 18 accounted for 57 per cent of the rapes reported, with the youngest being five years old.

Adults and children engaging in sexual relations are in an inherently unequal relationship. The sexual offences laws of most countries recognise this by putting in place a presumption against the ability of young children to consent to sex, and by treating the consent of adolescents as legally irrelevant. In South Africa, children under the age of 12 cannot consent to sex and sex with minors between the ages of 12 and 16 years is proscribed.<sup>344</sup> At the same time, the criminal justice system has historically treated the credibility of child witnesses with immense suspicion. This is perhaps most obviously expressed in the operation of the cautionary rule which, in South Africa, continues to apply to the testimony of child witnesses. By operation of this rule of evidence the courts are required to treat the testimony of children with special care and to apply caution in deciding to convict solely on the basis of that evidence.<sup>345</sup>

### CHILD TESTIMONY AND CREDIBILITY

The difficulties faced by children, who do not have the concepts or language to comprehend and explain the nature of various sexual acts, is a matter of long-standing concern, particularly within an adversarial criminal justice system.<sup>346</sup> This difficulty is severely compounded when the child is not being addressed in her mother tongue. In one case the reason given for refusing to prosecute was that when the child, aged six, was asked 'what is rape?' she responded 'other day'. In another case it was noted that the five-year-old complainant had said, on one occasion, that she had been raped five times and on another occasion that she was raped four times. This was taken as contradictory in respect of the

substance of the charge, despite the fact that medical evidence showed that penetration had occurred,\* rather than an understandable inability to remember each individual act of molestation or, quite simply, an inability to count.

Samantha Waterhouse points out, based on more than a decade of providing court support to rape victims, that

The majority of child complainants report extreme fear and anxiety at the prospect of facing the accused in court. This exacerbates confusion and influences the ability of the child to remember details of the event. The child may, as a result of the anxiety or as a result of shame at speaking to strangers and the public about the sexual offence, withhold important information or close down completely in order to protect themselves from the memory and the perceived emotional danger.<sup>347</sup>

Although the Criminal Procedure Act provides for various protective measures to be applied, including the appointment of intermediaries,<sup>348</sup> *in camera* hearings that exclude the public,<sup>349</sup> and the use of CCTV cameras,<sup>350</sup> the Constitutional Court has acknowledged that these are not being implemented in the majority of cases involving children.<sup>351</sup>

#### GETTING TO COURT

Young children cannot get themselves to court. They need to be taken there. This means that the case is reliant on the cooperation of an adult—hopefully a police officer or social worker, but often one who has been living with or is even complicit with the perpetrator. This seems to have been the situation in a case involving an 11-year-old victim, who was the oldest of three stepdaughters, the other two aged ten and six years. She claimed that her stepfather, a member of the notorious 28s gang with a number of previous charges of rape against him (although

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\* Finding: 'underwear faecally soiled and wet/discharge. Labia majora swollen; labia minora + f/n red and swollen ++; bleeding in small areas - looks like friction; hymen injured - fresh tears at 9, 11, 1300 o' clock; unusually large opening of the hymen ('gaping wide open'; vaginal discharge +++; vulva covered in discharge, faecal soiling. Injuries suggestive of recent penetration.'

no convictions), had raped her while they were alone at home. The medical examination confirmed previous penetrative sexual intercourse.\* On their court date, eight months after the case was opened, the investigating officer went to fetch the complainant and her mother. He was told that they had gone to court by taxi. They never arrived. The investigating officer reported that he then phoned the mother who said 'their feeling was that they did not wish to continue with the case'. Interestingly, the prosecutor's notes suggest that he had continued with the matter despite an earlier indication that she wished to withdraw the complaint. He states:

1. Witnesses did not arrive.
2. I waited until 12pm.
3. Obviously they are not interested.
4. The complainant wanted to withdraw but I decided to continue with the case.
5. Case withdrawn.

There is no withdrawal statement from the complainant in the docket. There also appears to be no recognition that attempts to withdraw the case might have been connected with the complainant not arriving at court, or related to the stepfather's known propensity for violence. Most importantly, there is no indication that any action was taken to investigate the home context or to take these three young girls into care.

Conceptions of rape complainants as inherently uncooperative and therefore in constant need of proving their worthiness and credibility have profound implications for their safety. This is vividly illustrated in the story of a six-year-old who woke up to find her uncle lying on top of her, holding his hand over her mouth while he pushed his fingers into her vagina and anus. The alleged perpetrator had previously been convicted of rape. The medico-legal examination confirmed trauma to

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\* 'Findings of examination consistent w/ previous sexual intercourse/penetration. --swelling of hymen + tear possibly suggests recent intercourse. --hymen small tear (fresh?/old) 8 o'clock. Gynaecological findings consistent with previous penetrative intercourse.'

her vagina, as well as evidence of choking, bruising and finger marks around her neck.\* One year after the case was reported, the detective wrote:

The witnesses in this matter are not giving their cooperation ... They have not attended court proceedings. They have been warned and offered to pick them up. They are never at home to indicate if they have a problem.

The docket contains no fewer than four prior entries by the investigating officer stating that he had been to the complainant's house but that everyone was too drunk to assist him. Two weeks later the prosecutor closed the case, writing on the docket 'nolle prosequi: no cooperation'. The alleged perpetrator in this case had a prior conviction for rape.<sup>352</sup> There is no indication in the docket that this child, so obviously in need of care, had been referred to a social worker. Instead, her dysfunctional context—which is exactly what made her vulnerable to sexual assault in the first place—further reduces her chances of obtaining redress. This is a systemic failure that cannot be solely attributed to the police, who are necessarily dependent on other state structures to provide social services.

## Adolescents

Adolescents are complicated. Many of the issues involving adolescents are described in other sections of this book, partly because they make up such a large portion of the sample and their cases seem to raise generic issues, and partly because their cases seem to be treated, in general, no differently from the adult cases. They are perceived to precipitate their own victimisation and eschew the protections that may be offered to them. Police expressed enormous frustration, for example, at the lack of cooperation from a pregnant 13-year-old, who refused to cooperate with them in apprehending a 'high-flyer', a designation given by the police to serious criminals involved in organised crime. While they were obviously

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\* Finding 'Evidence of choking. Bruising around neck/finger marks/scratch marks. Genitalia: Bruising. Tears. Finger marks on thighs. Slightly red and tender around introitus.'

very keen to arrest him on any basis, she point-blank refused to make any statements. Her sister told the police that they were boyfriend and girlfriend. In another case, involving a 14-year-old, the detective reported:

According the parents the victim tik [uses methamphetamine] with the boys and then they rape her afterwards. She is staying away from home for drugs and when she come back home again then she tell them that she has been raped. The parents don't know what to do any more because the victim don't want to lissen to them. She told them that she is going to move out of the house. According the parents she don't want to go on with the case. She said that she is not going to testify in court.

After two attempts by the detective to get the victim to identify the perpetrator, the case was closed on the basis of this statement. The question of when to prosecute for statutory rape is particularly relevant in situations where engaging in sexual relationships with older men can provide adolescents with access to resources and security that they would otherwise not have. It is difficult to respond to such incidents of transactional sex, other than on a case-by-case basis. In making these decisions the focus must be on the best interests of the child, but it is also critical to focus on the predatory conduct of the accused and to ask whether the accused has serially engaged in relationships with vulnerable young girls. Of course this applies only to cases in which the sex was consensual, not those where the accused merely claimed it to be so. Looking at the cases involving adolescents in this book, one has to take account of the extreme levels of violence associated with many of the rapes. While some of the cases might not, for various reasons, have easily succeeded in a rape trial, submissions by the suspects that sex was consensual certainly provides the basis for proceeding with statutory rape charges. But this does not appear to have been considered in even a single case. Instead, adolescence seems to render a complainant automatically suspect, providing an even more formidable barrier to credibility.

## SOCIAL SERVICES

One of the most disturbing aspects of both studies was seeing the failure of the state—and not just the criminal justice system—to provide meaningful protection to young girls living in contexts of extreme vulnerability. Only two dockets showed any indication that the case had been referred to a social worker. Although the SAPS have employed forensic social workers to assist with child victims, general social services remain acutely lacking. One detective complained of social services that

*... we referred cases to them many months ago—sometimes two years ago—but when they heard that we have a forensic social worker, they refer those cases back to us, saying that their waiting list is too long. They have not started counseling for the victim. To me that is very poor.*

Talking about a case in which the prosecutor declined to prosecute on the grounds that the victims, aged five and six, were too young to testify, the same detective was adamant that ‘if we had them [social workers] earlier on, that case I don’t think it would have been withdrawn ... It would have made a great difference.’ At the same time, civil society-based counselling services are constantly under threat of closing because they are not adequately supported by the state in their work and are unable to raise sufficient further funding from donors.

The failure to provide adequate social support to young complainants means that they are forced to remain in vulnerable situations, often in close proximity to the perpetrator. This is not necessarily the fault of the police. Consider the case of a 12-year-old who claimed that her stepfather had been raping her since she was nine years old. Although she had attempted to tell her mother about these rapes, it was only when she ran away to an aunt and said that she was afraid to go home that she was taken to the police. The medico-legal examination concluded that there was ‘[e]vidence of sexual activity—tear [on posterior fourchette] would indicate violence. Thickened irregular edge of hymen with no active trauma suggests longstanding history’. The accused had a string of convictions for offences including assault GBH, possession of marijuana, robbery and housebreaking. The investigating officer opposed bail on

the basis that the accused had a reputation for violence and 'will threaten the mother to influence the victim to withdraw the case'. There was no indication in the docket whether bail was given. All we have is an entry that says 'withdrawn pp'. No reasons were given for the withdrawal. No referral was made to social services, to all intents and purposes leaving the victim without protection or recourse.

## Intellectual impairment

Women living with mental disabilities are especially vulnerable to sexual violence and face particular difficulties in understanding the law and accessing the criminal justice system.<sup>353</sup> The competence of mentally impaired people to credibly recount their victimisation in court is likely to be challenged on the basis that they cannot know or cannot remember, and they are almost invariably seen as lacking credibility, embodying for some the stereotypical crazy woman who fantasises and lies about being raped.<sup>354</sup> In one case the medical examination ascertained that the complainant, described as 'slightly mentally disturbed,' was still a virgin. The student constable who took her statement wrote:

By the time she was telling the story she was crying talking here and there. Her mother said she is slightly mentally disturbed. That is why she is talking here and there.

Interestingly, the complainant's withdrawal statement uses precisely the same language:

... I am also slightly mentally disturbed. I sometimes talk here and there.

It is in fact not clear from the statement that she had ever claimed to have been raped.

Only one of the six cases that specifically referenced mental health problems contained any indication that a referral had been made to obtain psychiatric support and an expert evaluation. A note in the investigation



diary pointed out that the service provider, a non-governmental organisation, had a 10-month waiting list. A case involving a 14-year-old provides some insight into the intersection of poor living conditions, vulnerability and mental-health problems. The child claimed to have woken up with her stepfather on top of her. She, her mother, stepfather, and two younger siblings all shared the same bed. The medical examination noted the possible presence of a sexually transmitted infection.<sup>355</sup> The girl recanted a couple of hours after laying the complaint. Without attempting to make a referral, the detective noted that she had a 'mental impairment', although this had not been 'formally assessed' and closed the case.

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What does a victim have to do to be credible as a complainant? She must take the process seriously: she must be an active participant, always interested, proactive, rational, reliable, unwaveringly consistent and always available. That shows that she is genuine in her complaint and takes her victimisation seriously. She must also participate in the investigation by tracking down witnesses and sometimes even by finding the accused. Children and adolescents run into particular problems around their credibility. They are inconsistent, they are vulnerable because of family circumstances that make their participation in the process unreliable—often they are simply intransigent. For many rape victims it is a difficult decision whether to report being raped to the police. Once they have done so, the matter has been handed over—in the ensuing months they assume that their case is being investigated. Few would have any notion that their failure to call the detective and to actively follow the investigation might hamper their credibility, because it showed that they didn't take it (the case, themselves, being raped) seriously.

## CHAPTER 6

# Complainant Withdrawals

withdraw: retract • recant • disclaim • abjure • backtrack •  
repudiate • give up

Police consistently point to victim withdrawal in rape cases as the single most important reason for case attrition, a refrain repeated by even the most sympathetic scholars.<sup>356</sup> The South African Police Service have said that 'the disposal of rape and attempted rape cases as withdrawn significantly contributes to the low number of cases referred to court and prosecuted', which in turn impacts on conviction rates. Researchers have noted extreme levels of police frustration with 'complainants who report crime only to withdraw the case shortly afterwards'.<sup>357</sup> Policy- and law-makers have threatened to charge victims of rape and domestic violence who withdraw their complaints with perjury and defeating the ends of justice, and to adopt a policy of mandatory prosecution.<sup>358</sup> For them, case withdrawal is the archetype of victim 'non-cooperation': it epitomises the recalcitrant rape victim without whom a case cannot be prosecuted, despite the best efforts of the criminal justice system.

As early as 1981 Gary La Free identified the willingness of the victim to prosecute as a key factor in determining whether a case remained in the system.<sup>359</sup> More than a decade later, Harris and Grace highlighted a lack of data on why complainants withdraw their complaints so early in the process as a critical gap in our understanding of attrition.<sup>360</sup> Kelly's 2005 review of five UK studies shows that between half and two-thirds of cases dropped out of the system without being referred for prosecution. In this regard she highlights that '[t]he most significant contributors to early loss of cases are designation of cases as false reports and withdrawals by the victim/complainant'.<sup>361</sup> Harris and Grace also found that the main reason for 'no further action' by the police was that the complainant did not want to proceed. Twenty-five per cent of cases discontinued by the Crown Prosecution Service were reportedly dropped because 'the complainants would not cooperate' or there was not enough evidence to

secure a conviction.<sup>362</sup> The issues of victim cooperation and evidence are closely related. As Frazier and Haney point out, police may legitimately interpret victim reluctance to proceed with the case as impacting on the availability of evidence with which to prosecute the matter, but can equally regard it as going to the credibility of the victim and confirming their scepticism regarding her report.<sup>363</sup> Thus, her refusal to cooperate may very well raise questions as to the veracity of her initial complaint, leading to the suggestion that complainants who withdraw be charged with perjury.

Various studies have revealed some of the complex reasons why victims withdraw their complaints, including fear of the perpetrator, intimidation, family pressure and impact of practical problems (such as, relocating, child care, time off work to attend court). These studies have also raised concerns about the criminal justice process, providing evidence that cases are sometimes withdrawn because the police said the case would not succeed; the complainant had been worn out by poor administration (delays and postponements); and the complainant was not provided with pre-trial support or adequate information on her case.<sup>364</sup> What the studies show is that it is difficult to neatly parse victim decision-making from administrative and other systemic imperatives.

Wayne Kerstetter, who also identifies the complainant's willingness to proceed as the most important variable in founding decisions, acknowledges that it 'is more complex than a simple statement of complainant volition'. He focuses his analysis on variables such as weapon use, threats to the complainant, the presence and availability of witnesses, and the apprehension of a suspect—all of which, he suggests, facilitate her decision to proceed. Kerstetter points to the role that these factors play in influencing the attitude of the complainant, but suggests that they are secondary to the 'administrative and bureaucratic considerations' of detectives who may use a violation of these norms as a pretext to discouraging complainants. He provides a useful corrective to the overriding concern with sex-role norms and the notion that the decision not to 'cooperate' in an investigation rests solely with the complainant, by gesturing to the way in which stereotyping and the bureaucratic interests of detectives may intersect. The reasons why detectives might encourage

a complainant to withdraw include their own attitudes, but might equally be based on 'their predictions—accurate or inaccurate, reasonable or unreasonable—about the effect of the complainant's actions on later criminal justice process decisions.'<sup>365</sup>

And yet, we know surprisingly little about why victims withdraw from the criminal justice process. Most studies tend to provide a list of the reasons why cases are withdrawn, as written on the front of the docket. Inevitably, these are decontextualised from the facts of the case and the social context of the complainant. While they appear comprehensive and provide us with a useful list of reasons that are open to further interrogation and comment, they are at the same time often very broad in their categorisation.<sup>366</sup> Technikon SA looked into the question of case withdrawals in two jurisdictions, both marked by poverty, unemployment and high crime rates, some 10 years ago. The research looked at 'social fabric crimes', which were defined to include murder, rape, assault with the intent to do grievous bodily harm (assault GBH) and indecent assault. It found that 24 per cent of the 172 rape cases were withdrawn at the request of the complainant. The researchers noted that '[t]he SAPS does not appear to investigate the reasons for a withdrawal of charges by the complainant', which might explain why no reasons are provided for these withdrawals in the research report.<sup>367</sup> However, one of the authors subsequently addressed this lacuna in a paper presented at a conference of the British Society of Criminology, where she listed the following reasons: the perpetrator asked for forgiveness; at the request of the complainant's family or the matter was sorted out between the families; the elders spoke and came to an agreement; the suspect is her husband or boyfriend; the victim and suspect work together; the perpetrator paid her medical costs; the matter has been sorted out between them; the complainant has no interest in the case; because of the baby; the complainant cannot attend court because of work or because she is too old; the complainant felt sorry for the perpetrator; the perpetrator is already in jail for another offence.<sup>368</sup>

Remarkably, she concludes this list with the statement that '[i]n essence, the matter has been sorted out and an alternate resolution found'.<sup>369</sup> Before we can come to this conclusion we need a far better idea of what is

behind the apparent rejection of the criminal justice system by victims. The list above places the implicit locus of responsibility on the victim, shifting responsibility away from the criminal justice system. While acknowledging the agency of victims in choosing to resolve their complaint through means other than the criminal justice system, it ignores the personal constraints—financial need, relationships—and systemic pressures that mediate choice.

### **The complexities of case withdrawal unpacked**

Forty-two (32 per cent) of the Western Cape dockets and 10 (16 per cent) of the KZN dockets contained complainant withdrawal statements. I describe the reasons for withdrawal in some detail below and contextualise these in terms of the facts presented in the cases. This provides some insight into the internal dynamics of each case. Further insights can be gleaned from the reports of victims receiving counselling and court support at Rape Crisis. But before considering this analysis, it is important to be reminded of the regulatory framework that governs case withdrawal, providing the framework within which the closure of cases on this basis should happen.

### **The regulatory framework**

The SAPS Standing Orders on the Closing of Dockets specify that cases may be designated as ‘withdrawn’ where ‘an offence has been reported and there is insufficient evidence that the accused has committed it ...’.<sup>370</sup> In other words, cases where the police do not believe that a rape took place, or where the perpetrator is unknown, should never be closed as ‘withdrawn’. In this regard, the Standing Orders explicitly provide that cases that would otherwise be classified as ‘undetected’ or those in which ‘they consider a prosecution undesirable’ may not be included in this category. The latter determination can only be made by a prosecutor. Where a complainant requests that the case be withdrawn, the Standing Orders state that this may only be accepted ‘in a case of no consequence’.<sup>371</sup> One would therefore expect rape cases to be entirely excluded from this

provision. Furthermore, the Standing Orders recognise that there is a public interest in the prosecution of such cases, providing that:

... [complainant withdrawal] shall not be permitted in a serious case, or in any other case if the circumstances are such that, in the interests of public justice, the charge should be proceeded with.

Before allowing a case to be withdrawn the supervising officer must be satisfied that there has been no 'compounding', an offence which entails agreeing for a reward not to prosecute a serious crime,<sup>372</sup> and the complainant must sign 'a document' requesting that the case be withdrawn and providing reasons. Section 325.2.1.3 of the Standing Orders states unequivocally that '[o]n no account should the police suggest to a complainant that he should withdraw a charge'.

Assuming that rape cases fall within the ambit of this provision, as they certainly do in practice, if not on a strict interpretation of the Standing Orders, the regulations governing case withdrawal are fairly comprehensive. They provide an injunction against undue influence by the police, allow for a decision to take account of broader societal interests and the integrity of criminal justice processes, and ensure a certain amount of internal oversight. In practice the picture looks somewhat different, reflecting a broad discretion to accept withdrawals and casting a question over the commitment (or ability) of the police to protect complainants and act against perpetrators.

### **Do relationships matter?**

I have argued that relationships do matter and that getting the relationship right analytically is critical for not falling into our own stereotypical assumptions about victim engagement with the criminal justice system. The profile of case withdrawals in the Western Cape supports the contention that rape cases are predominantly withdrawn by complainants who 'know' the perpetrator. Nearly half of case withdrawals occurred where the complainant was currently or had been in an intimate relationship with the perpetrator. These cases were

clustered in the 17-35 year age group, which also accounted for the bulk of the total withdrawals (64 per cent). At the same time, it is worth noting that in nine of the cases, the perpetrator was a stranger, or only known by sight to the complainant. In a further eight cases the complainant and perpetrator were merely acquainted, with this category being more evenly spread across the different age groups. It is not only in cases where complainants are in an intimate relationship with the perpetrator that case withdrawals occur. As seen below, there are a range of reasons beyond the fact of a prior relationship that influence case withdrawal, although a prior relationship will often be a factor.

### **Who withdraws complaints?**

On the face of it, complainant withdrawals were responsible for the closure of close to a third of the Western Cape dockets. These figures tend to support contentions that it is complainants who are largely responsible for attrition in rape cases. But the cases discussed below suggest that this view may be misleading, both as to the extent of the problem and the reasons behind it. A detective I interviewed provides a nice summary of the reasons generally given to explain victim withdrawals:

*Most of the cases in my opinion that have been withdrawn is when the victim knows the perpetrator. They had some relationship. And then they either feel sorry for the guy or they get threatened or they have been paid ... and they come and withdraw the case.*

At least one investigating officer has sought to systematise complainant withdrawals, giving some insight into the reasons he thinks cases are withdrawn. He has done this by drafting a pro forma withdrawal statement, found in one of the dockets.

The statement, drafted in Afrikaans, reads as follows in translation:

I ..... of .....  
 declare that on ..... I reported a case of .....  
 ..... at .....  
 Police Station. The accused in the matter was .....  
 .....  
 I would like to withdraw the case against this person and  
 require no further investigation of the case.  
 The accused and I sorted the matter out/ I would like to  
 withdraw the case for personal reasons/ The person has  
 compensated me for the damages caused.  
 I am sober and of sound mind. I was not forced by anyone  
 to withdraw this case.  
 [Oath, date, time and commissioner of oaths stamp].

On this account all case withdrawals invariably come down to one of three broad reasons, all ostensibly acceptable bases for closing a rape case.<sup>373</sup> The document also comes perilously close to a confession: agreeing to withdraw a criminal complaint for compensation is an offence, albeit not one with which complainants have yet been threatened.

### **Reasons given by complainants for case withdrawals**

In seven of the Western Cape cases no reasons were provided. Contrary to the Standing Orders, 10 cases which were clearly either 'unfounded' or 'undetected' were also closed on the basis of a complainant withdrawal statement. These 10 cases, discussed further below, reveal a systemic reluctance to pursue the case, rather than the personal reticence that can be seen in the remaining 32 withdrawal statements, where the complainant's withdrawal is the primary reason for closing the case. These 32 cases still account for almost a quarter of the sample, but constitute a smaller number of cases than might have been assumed from anecdotal evidence. The identified reasons for case withdrawal are



## COMPLAINANT WITHDRAWALS

reflected in the table below, which precedes a more detailed discussion of each category. In KZN 8 of the 10 cases were recorded as having been resolved by discussion between the families of the complainant and the accused.

**Table 6.1 Reasons cited in rape complainant withdrawal statements**

REASON	WESTERN CAPE	KWAZULU- NATAL
Sorted out the matter between the families	10	8
Has a child with the perpetrator/ reconciled	9	1
No reason given	7	—
Complaint was unfounded	6	1
Leaving Cape Town	5	—
Threats	5	—
Unable to assist with investigation	4	—
Obtained an interdict/ perpetrator left the home	2	—
Doesn't want to go to court	2	—
Matter was diverted	1	—

\* Note that more than one reason might be given and recorded.

### MATTER HAS BEEN 'SORTED OUT'

A distinction must be made between cases where the parties have 'reconciled', discussed further below, and those where the complainant states that the matter has been 'sorted out'. In my categorisation of the cases the former has been taken to happen when the parties are or have been in an intimate relationship, while the latter covers a much wider range of relationships and contexts, although they might include the former, where the indications are that the parties are separating. Examples of this category include where the complainant has left the perpetrator and obtained a domestic violence protection order, or the perpetrator has left the communal home and the complainant is satisfied that he will not be returning.

Ten of the Western Cape cases in which the complainant withdrew her complaint contained some indication along the lines that 'we have

sorted out the matter'. Typically these cases were withdrawn within one to two weeks, with only one continuing for two months. None appeared to have come anywhere near being court-ready. It is disturbing that in five cases—half of those in which the matter was 'sorted out'—the complainant was under the age of 16 years. Three involved children under the age of 12 years. One of these cases, involving an unfounded allegation of rape perpetrated against a two-month-old baby, is discussed elsewhere in this book. A withdrawal statement was not necessary in that case, which should have been closed as 'unfounded'. The other two cases, both involving juvenile perpetrators, are of interest.

In one of these cases the six-year-old complainant was raped by a twelve-year-old boy. The medico-legal examination confirmed penetration, concluding that 'based on clinical examination penetration has taken place within the last 3-4 days'. Only six weeks after the complaint was made, the child's mother withdrew the case with the following statement:

We have spoken to the family and I am satisfied that they send their son for counseling.

The investigation diary confirms that the detective had visited the mother who told him that the two families had spoken and 'sorted the problem out'.

The second complainant, aged seven, was sexually assaulted by three boys aged between 10 and 13 years, who she said took her to a shack 'where they done funny things to me'. The case was closed by the child's mother three weeks after the rape, and on the same day the detective received the following admonition from his commanding officer:

You have no excuse! Not even the week that you spent [out of the office] on course will get you off the hook. You had a week at least to consult with the complainant and to forward the exhibit to the lab ... You are failing this victim dismally. You are hereby once again (final!) reminded that the crime kit should be forwarded to the [forensic laboratory] within 3 days after receiving it.

## COMPLAINANT WITHDRAWALS

The detective responded by obtaining a withdrawal statement from the mother as follows:

I don't want to proceed with the case as the perpetrators are already punished. I also punished the perpetrators as I was asked to do so by their parents ... I also went to the parents of the perpetrators with the investigating officer as to warn the parent of the perpetrators to look after their children.

The detective's failure to forward the crime kit, containing samples taken during the medico-legal examination, to the forensic laboratory suggests that the outcome of this case was determined on day one when that examination took place. The decision to informally castigate the perpetrators was not the detective's to make and, ironically, through his actions he may have denied them access to a young sex offender programme, which could have provided remedial intervention. By choosing to deal with the matter informally he may have compounded the vulnerability of both the victim and the young offenders, who clearly needed something further than parental intervention.

Reconciliation between families was particularly prevalent in the KZN cases. These cases require careful interrogation to understand the relationship between criminal justice actors and community-based/informal/traditional dispute management practices. The dockets provide very little to go on. Consider:

I wish to state under oath that I am withdrawing the case against the accused in this case. My reasons for withdrawing the case are: I have discussed the matter with my family members, the family of the accused have come to my family and apologised on the behalf of the accused. The matter has been resolved between the families and I came to the decision to withdraw the case.

and

The matter has been discussed with my parents and the accused parent and we came to the decision to withdraw charges against the accused. I am no longer interested in the case.

This is a context in which livelihoods are under exceptional strain and social relations are a critical resource. A prosecutor expresses the dilemma she faces as follows in her notes:

The complainant and her husband approached me and wanted to withdraw the matter. The mother of the suspect was also present at the time. I explained to them the seriousness of the matter and that the case could not be withdrawn. The father of the victim was adamant that the family did not wish to proceed with the matter, saying that the two families have had good relations over the years and that he did not wish to see the family of the suspect suffer. The parents of the victim are adamant that the matter be withdrawn and are not willing to cooperate any further in the investigation.

The impact of family pressure is also evident in one of the Western Cape statements:

The family of the accused has been in contact with my mother who is in the Eastern Cape. My mother has requested me to withdraw the case, and she has also found employment for me in the Eastern Cape.

An earlier note in the investigation diary recorded that the 'first report witness', the person to whom the complainant first reported being raped, also 'does not want to get involved because her boyfriend and sister scolded her. She is scared.'<sup>374</sup>

Bland statements that the matter has been 'sorted out' are extremely problematic, hardly qualifying as a 'reason'. For example, how does one begin to think about a case involving a 17-year-old who was allegedly

## COMPLAINANT WITHDRAWALS

raped by her foster father? The man was not arrested and a week after the complaint was laid it was withdrawn with the statement:

The problem was sorted out between my father and myself.  
I do not wish to continue.

No further action was taken. No indication is given that any supportive or protective measures were put in place—ranging from social welfare interventions to a domestic violence protection order. The decision of a 17-year-old to eschew any form of systemic recourse passes without comment.

## COMPENSATION

The issue of family rapprochement and compensation is a key concern that comes up again and again in discussion with people working in the criminal justice system. There is a perception, created largely in the media and through anecdotal claims from investigating officers, that 'informal justice' practices account for substantial numbers of the case withdrawals involving child victims. Charlene Smith, a well-known South African journalist and anti-rape activist, writes for example that

[i]n Meadowlands, Soweto, Superintendent Nico Snyman says 90 per cent of rape is against children aged 12 or younger. He says they arrest around two-thirds of perpetrators, but are lucky to get convictions in a fifth of the cases. The reason? Many parents are happy to accept as little as R50 to drop charges.<sup>375</sup>

The article goes on to suggest that such payments are one of the most common reasons for unsuccessful prosecutions in South Africa. There is little evidence within the dockets to support this view. That is not to say that it is not happening—only that, to the extent that it is happening, it is not visible. This might have something to do with claims that the police themselves are doing the brokering, as suggested by Helene Combrinck and Zukiswa Skepu's report on bail in sexual offences matters, documenting a case where 'the police' set up a meeting between the perpetrator and his victim, at which the perpetrator offered her family R5 000 to drop the charge.<sup>376</sup>

None of the Western Cape and only one of the KZN dockets provides any indication that compensation was paid. That complainant is explicit in explaining her motivation:

This matter was discussed by our family and we come to decision to withdraw against the accused. Accused parent pay damages. I am no longer interested in the case.

The lack of explicit reference to compensation makes it difficult to gauge how often such payments are made. It did, however, come up at Rape Crisis. One counsellor recorded that:

The perpetrator's father is a policeman and his mother came to the client to offer her money to drop the charges.

In another case the complainant dropped the charges because the perpetrator's mother started providing support and gifts for her baby.

All the detectives I interviewed confirmed that they were aware of payments. One detective described a case with which he was involved as follows:

*I got a case for the same suspect that raped two teenagers and now I hear ... that the case has been withdrawn [in court]. The two victims never came to court ... I then found information that they have been paid by the guy. If I get paid, I cannot go to the police and say I have been paid. So it is very difficult to expose. But information is there that people are being paid.*

Another detective located this practice within a specific community, arguing that class and culture differentiate how communities deal with rape:

*In the coloured community it is very seldom [that you see compensation being paid], but in the black community you will see that kind of payment is being accepted by the people. The black community will settle the dispute there and ask*

*the perpetrator a certain amount for damages done. In the financially secure sector you will find that they keep it within the families and solve the problem in the family, because their images will be ruined.*<sup>377</sup>

And yet another detective, who similarly pointed to compensation as a problem in 'the black community' averred that payments were far more explicit:

*You interview the victim and they tell you that the suspect's parents offered them some money. What can you as a policeman do? Nothing. And then you ask them 'Is that the reason why they drop the case?' and they say 'yes' ... Now the people have dropped the case and you are sitting with the docket.*

This view raises important questions about the relationship between reality, perception and practice. If certain groups of people are seen as more inclined to withdraw a complaint when compensation is offered, is it also more likely that police will assume that this is the reason for the withdrawal? And what do we make of the criminal justice system's abdication of responsibility to deal with such cases in favour of 'traditional justice'? When asked about compensation, the general response was that this is a 'black' thing and yet, when pressed, all the detectives recounted stories of other rapes where payments had happened, including a gang-related rape in which the perpetrator paid the victim's hospital bills and compensated her family. When the police went to see that complainant the perpetrator informed them that the family had been paid.

A possible alternate explanation for the racialised descriptions provided by the police is offered by a prosecutor, who explained that:

*Many white women would say, 'Please make sure you win this case, otherwise I'll go to the Minister [of Justice].' Many of them are empowered. The poor woman from the township, she just wants the case to be done ... The white women want to know why the guy was acquitted and take it further. The black woman from the township just accepts it and goes on with her life.*

In this way, racialised poverty in South Africa not only results in greater vulnerability to sexual violence, but also an inability to articulate strong demands on the system. Without police needing to overtly discriminate the effect is one of differential access to justice.

A final reason why withdrawals based on compensation payments may not be explicitly referenced in the dockets is that such withdrawals amount to the criminal offence, compounding, as described by Burchell 'a kind of passive obstruction of justice involving agreements to refrain from prosecuting in consideration of payment'.<sup>378</sup> The SAPS Standing Orders specifically require supervising officers to vet cases for compounding before agreeing to closing them as withdrawn.<sup>379</sup>

#### COMPLAINANT AND PERPETRATOR RECONCILED

In nine of the twenty Western Cape cases involving a current or former partner the complainant claimed in her withdrawal statement that she had reconciled with the perpetrator. This accounted for one in five of the total victim withdrawals. Two cases were withdrawn within three hours of the complaint being laid and most had been withdrawn within five to eight weeks, with only two taking as long as four months.

Within a sample of cases that already reflect extremely high levels of violence and injury, the violence perpetrated against current and former intimate partners is staggering.<sup>380</sup> Five of the victims suffered substantial physical injuries from being beaten, stabbed and even bitten.\* In this context 'reconciliation' becomes a loaded term, which does not necessarily reflect the dynamics of the relationship or the nature of the choice. Instead, withdrawals made on this basis contain a common refrain: *What will become of me; what will become of my children; where will I go?*

In four of the cases the reason given for reconciling was that the complainant and perpetrator had a child together, supporting the

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\* Complainant 1 was 'tender over the left arm', where the accused had hit her with the blunt side of an axe, threatening (per her statement) to 'cut her' if she did not have sex with him. Complainant 2 was abducted, held hostage and beaten with a broomstick, with the medical report indicating abrasions over her thorax and spine and genital injuries that 'could be consistent with a history of rape'. Complainant 3 suffered 'multiple contusions to scalp; large bruise, linear to mastoid area behind left ear; large bruise to upper R shoulder; multiple bruises to L arm/forearm; R periorbital haematoma'. Complainant 4 suffered 3 x 2 bruise over inner aspect of the L upper arm; 2 x 2 bruise over the L scapula caused by bite.'



contention of detectives that one of the reasons why complainants withdraw cases is that 'the perpetrator is the breadwinner in the house and the mother [is thinking] of what is going to happen [to the children]'. One complainant expressed her quandary as follows:

I am currently unemployed. I came back from the Eastern Cape the end of July [four months after the rape was reported] and since then never worked. I don't want to proceed with this case anymore. [The accused] supports our child.

These cases reflect not only extreme levels of sexual and physical violence, but also structural violence. The reality of grinding poverty and unemployment means that often complainants are left with little choice but to return to the perpetrator. Another withdrawal statement, made only a week after the complaint was made, says:

I now wish to withdraw the case because the person I layed a charge against is my boyfriend. He asked for forgiveness for what he did and promised never to do it again. Furthermore I have a two month old child and he supports us both so if he remains in custody we'll both be in a very difficult situation.

It is only when one considers the context in which this 'choice' is made that the extent of her extreme vulnerability becomes apparent. Her ex-boyfriend had come to her shack the previous week and dragged her by her hair to his house, where he locked her inside and raped her repeatedly through the night. She escaped through a window with her baby and went to the taxi rank, where he found her and instructed a friend to take them back to the house. There he assaulted her with a broomstick before raping her again. She escaped when he finally fell asleep.

Detectives may not even recognise the extent to which a complainant's choice in the matter has been compelled. One complainant was asked by the detective if her husband's employers had forced her to withdraw the complaint. He noted her response in the investigation diary:

(She said) she did it out of her own because her husband could lose his job and then she had nowhere to go.’\*

In at least one case it is unclear that the parties had in fact reconciled. Immediately after the medical examination, in which it was confirmed that she had been seriously assaulted,\*\* and only three hours after laying a complaint with the police, the victim wrote:

I do not require further police investigation. I don’t want [the accused] to be arrested. I don’t want him charged or for him to go to court. In any case I don’t want to go to court. [The accused] is my boyfriend and I love him.

In the meantime, the investigation diary notes:

The victim is a self-confessed drug addict and is also suicidal. She is a very strange individual and it seemed to be that she might be mentally ill.

Only one case fits the stereotypical conception of a complainant who reports a rape and immediately reconciles with the perpetrator. In this case, following a report that the complainant had been raped and assaulted, the police went to arrest the perpetrator. There they found the complainant, who stated that:

The incident occurred on 07 Jan 2005 at about 01h00. That same evening at about 17h00 I moved back in with him. We have sorted out all our problems and are living together again. We are also busy with wedding plans.

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\* The medical report confirmed ‘[s]exual intercourse (forced)’, ‘tender labia majora’, ‘tender around neck, neck choked. Tender around L elbow (bruises), soft tissue injury. Physical assault’.

\*\* Per the medical report the complainant suffered ‘multiple contusions to scalp; large bruise, linear to mastoid area behind left ear; large bruise to upper R shoulder; multiple bruises to L arm/forearm; R periorbital haematoma’.

## THREATS

Detectives were in agreement that 'there is a lot of intimidation', but that complainants were generally not forthcoming about it and, as police officers, 'you would not get that information'. One of the reasons for this, it was suggested, is that intimidation and the payment of 'compensation' are closely linked. This is a suggestion that should raise questions about the extent to which those payments are freely received, but obviously doesn't. While detectives might have a suspicion that this was the reason for case withdrawal, they say that complainants 'come out with excuses to say they don't want to go through with the court process or they say I feel sorry for him'. It seems likely that threats and intimidation are in fact more likely to inhibit a complainant from reporting the rape at all than the withdrawal of a complaint. However, in at least five cases the complainant specifically stated that she was not prepared to continue with the case because she feared for her life.

There are two different types of cases in which threats feature as a reason for case withdrawal. Three of the five cases explicitly involving threats were withdrawn within days of the complaint being laid and involve former partners. The other two cases stayed in the system for marginally longer and involve strangers, both times with apparent gang connections. The system's inability to deal adequately with threats and intimidation is an intrinsic weakness. There is only so much protection it can offer. Victims can be removed only so far from the place in which they are threatened and then for only so long. Most cannot deal with being displaced in this way—removed from families and support structures just when these are most needed. Eventually they return to their communities. As one detective put it: 'You want to be at home, so they go to their homes'. However, the cases involving intimate partners also show an indisputable failure on the part of the criminal justice system to deal adequately with the violence leading up to the rape and to take threats seriously.

Perhaps these factors provide some kind of explanation for why a perpetrator is recorded by the investigating officer to have said that 'he is not scared of prison'. His ex-girlfriend withdrew her complaint against him, citing the following reason:

I do not want to proceed with this case any further because people I don't know is threatening me not to go on with this case.

In another case the perpetrator threatened to kill her if she went to the police. The officer who took the statement noted that the perpetrator's friends were calling her during the interview. She withdrew the complaint that same day. Another withdrawal statement only says that the complainant doesn't want a court case, but the detective notes that 'since the rape the suspect keeps threatening the complainant'. The man had three suspended sentences (each of three months) for breaching a domestic violence protection order, an offence which carries a maximum penalty of five years.<sup>381</sup>

In some cases one has a sense that perhaps victims are not even looking for justice, in the sense of a conviction. Instead, they want their victimisation and the injuries they have sustained recorded. They want somebody to know. All three cases involving intimate partners were withdrawn within one to two days of the complaint being laid. The rapid withdrawal times (within hours or after one or two days) noted in these cases seem insufficient time to 'test' the ability of the system to protect, and suggests some other purpose for laying a complaint. One detective made the telling point that often victims 'just want someone to talk to ... they want some sort of relief [and] they want to report it, but not as a criminal case.' He continues:

*She has this problem, wants to report it, but does not want to lay charges. She wants the person to stop doing it and this is why she is reporting it to someone.*

In some cases, the victim does not even want the perpetrator approached by the police: she just wants the police to know. Asked what the point is of this, the detective responded that 'they feel safe when someone else knows about it, because they are scared'. In two of the cases, there were indications that the complainant had also obtained a domestic violence protection order. In one of the cases she left Cape Town and returned to the Eastern Cape two days after the rape.

Two cases, in which the perpetrators were unknown to the victim, were withdrawn on the basis of threats. In the first case, the victim was raped by three men who broke into her house at 2.30 in the afternoon. Her screams alerted the neighbours, who broke down the door and managed to catch one of the perpetrators. While they were waiting for the police, the perpetrator was shouting threats at the victim, including that he would burn her house down. This man had already been convicted of rape twice and had an outstanding rape charge against him, in addition to cases involving malicious damage to property, possession of drugs, possession of a dangerous weapon, assault with intent to do grievous bodily harm, robbery and theft. Inexplicably, he was given bail. Two and a half months after the rape, the investigating officer visited the victim and was told that one of the outstanding suspects had been seen, but neither of the other two perpetrators was ever arrested. Four months after the rape the victim withdrew her complaint, saying:

I feel that my life is threatened by friends of the suspect who are gang members and there is no-one who can protect me.

In another case involving the Nice Time Kids gang, a 15-year-old witnessed the shooting of a man and was subsequently raped by one of the perpetrators, an obvious act of intimidation in and of itself and a means of compromising her credibility as a witness to the shooting. That case was withdrawn three days after the complaint was made. In a two-page withdrawal statement the complainant recounts what happened during the shooting, again giving the facts of the attempted murder case and of the subsequent rape, but says that she cannot go ahead with the case as she is afraid:

I do not want to make a case against this man because I am scared. I also don't want to testify against him. I don't want to continue with the case.

Can the police offer protection? Detectives interviewed were phlegmatic: bail can be opposed or withdrawn, an intimidation case can be opened,

victim protection can be provided, but this requires leaving home and inevitably victims decide to move back to their communities. In the one case where victim protection was offered the victim declined.

#### LEAVING TOWN

While cases might not explicitly reference intimidation, threats of violence and a history of violence at the hands of the perpetrator may leave the victim feeling that she must take action to ensure her own safety. This can mean putting distance between herself and the perpetrator and leaving town. In five cases, all involving current or former partners, the complainant withdrew her complaint on the basis that she was leaving the area. All but one case was withdrawn within three weeks of it being reported. Two involved complainants under the age of 16. In one of those cases the 14-year-old victim was sent to her family in Johannesburg, where she had an abortion. She conveyed to the investigating officer telephonically that she did not wish to continue with the case. This is the only case in which there were not extreme levels of violence used against the victim. In two of the cases, complainants already had domestic violence protection orders against the perpetrator, who had also breached those orders in perpetrating the rape. Although neither was charged in respect of the breach of the order, one had a case outstanding against him for previously breaching the order. One victim was stabbed by the perpetrator, another choked with the bandana she had been wearing. Another suspect attacked the police with a 30cm knife when they came to arrest him, throwing and breaking things, swearing at the police and his family and 'lightly nipping' one police officer on the finger. In four of the cases the complainant indicated that she was returning to her family in the Eastern Cape. A prosecutor noted that this is common: 'As soon as a child is raped her parents take her to the Ciskei or Transkei. In other words, the child is taken out of the community immediately'.

#### NO REASON GIVEN

In five of the cases where a complainant withdrawal statement was present in the docket it was impossible to tell from that statement why the case was withdrawn. Four of these statements read as follows:

## COMPLAINANT WITHDRAWALS

I wish to withdraw the case against [the accused]. No one is forcing me to withdraw the case. I am doing it of my own free will.

I, [victim's name], do not wish 2 proceed in this matter.

I do not wish to proceed with the case.

I hereby wish to withdraw the said case. I was under no circumstances threatened, intimidated or forced to withdraw the case.

In the final case, the complaint was 'withdrawn after consultation with the prosecutor'. The investigation diary simply states this and the complainant has signed below the entry.

It is impossible to review a decision for which no reasons are given. The formulaic statement, appearing in various manifestations, that no one is forcing, intimidating or threatening the victim to withdraw the complaint is insufficient to draw any conclusions about the context of the withdrawal. This frustration is evident in the exchange between the detective and his supervising officer regarding one of these cases. The supervising officer writes in the investigation diary:

What is the reason why the victim withdrew the case?

To which the detective responds four days later:

She do not want to proceed.

In at least two of the cases where no reasons were given, the victim suffered extensive injuries. In one case, the victim's husband assaulted her with a thick plank and shoved a spade against her neck before raping her anally and vaginally in front of their children, aged two years and five months. Her statement says that he was beating her throughout the rape and that:

... my children were crying. [So] he would stop, smack them and then he would continue raping me.

The medical examination confirmed extensive physical injuries.\* In another case withdrawn without providing reasons the medico-legal conclusion is stated as:

Injuries consistent with physical abuse/ throttling/ beating with a blunt object and dragging through broken glass.†

Given this context, one would expect more information to be present explaining the case withdrawal.

### Do the police play a role?

Although the police are enjoined from putting pressure on complainants to withdraw complaints, their solicitous advice to a complainant on the apparent strength, or not, of her case can certainly result in withdrawals, particularly when taken together with other situational factors. Wayne Kerstetter summarises this point nicely:

If the detective decides that he would like to unfound the case in order to avoid carrying it on his record as an unsolved crime, he may attempt to convince the complainant that it is not in her interest to pursue the case. The detective may vividly portray to the complainant the personal costs involved by emphasizing such things as the repeated trips to court, the inevitable delays at court, and the humiliating cross-examination by defence counsel. Conversely, if the detective wishes to pursue the case but the complainant seems ambivalent, the detective may attempt to strengthen her resolve by talking about the need for her cooperation to prevent an attack on another woman.<sup>382</sup>

\* The J88 records '[e]xtensive bruising consistent w/ forceful blunt trauma over legs, trunk, arms + neck; tender abrasion on neck; 30 x 10 cm bruise on upper thigh from plank, # of other bruises and abrasions to torso + upper legs.'

† The J88 records 'lacerations x4 to R hand and wrist and palm consistent with being dragged through broken window; R wrist swollen; bruising down L side + scratches; wound of lower lip; injuries consistent with n/o physical abuse/ throttling/ beating with blunt object + dragging through broken glass.'



The factors associated with complainant withdrawals may sometimes tell us more about whether detectives are interested in pursuing the case than about the complainant's inclination. Australian researcher, Denise Lievore, makes the further point that '... [t]his form of "discouragement" may be intentional or unintentional and perhaps even altruistic in some instances ... a victim who voluntarily withdraws from prosecution is spared being told that a jury would not find her a credible witness'.<sup>383</sup> But the data is seldom able to tell us whether a detective has been supportive or dismissive. The stories recounted above provide some insight into these attitudes, at least in so far as they reflect a lack of urgency about bringing serious cases to court, particularly when complainants already have domestic violence protection orders or the suspect has a history of violent behaviour and gang associations. Many of these cases show up the difficult choices made by complainants, who are dealing with complex social and economic realities. While it is not possible to draw any definitive conclusions about the role that detectives play in encouraging complainant withdrawals, it is arguable that this institutional malaise and the lack of attention to these cases can leave some complainants feeling alienated from the process.

More active discouragement was reflected in victim reports to Rape Crisis, where a number of women who sought to make a complaint were told by the police that they had a 'weak case'. Reasons given by the police for this conclusion included: a lack of physical evidence; a weak medical report; that the case would be 'difficult to prove'; that there was 'not enough evidence'; and that there were 'no other witness'.

Where victims are already daunted at the prospect of appearing in court and facing the perpetrator, a detective's 'objective' assessment that the evidence is problematic can tip the scale. A Rape Crisis counsellor explains that,

*The survivor was going to court, but was concerned because she had a stuttering problem. The investigating officer suggested that she drop the case because ... the evidence was not good enough.*

Again, it is impossible to tell whether this advice was warranted and whether the complainant was better off not testifying. It may be that she

was and that the investigating officer was well positioned to guide her in this regard. It may reflect a genuine understanding of how the courts treat complainants with even the slightest impediment. Or it may simply be a convenient way to lighten his case load. One has no way of telling.

## Administrative withdrawals

Ten of the Western Cape cases containing withdrawal statements were either technically unfounded or undetected. They did not therefore need withdrawal statements in order to close them and their inclusion in the 'withdrawn complainant' category is misleading. If public pronouncements and policy decisions are going to be made on the basis of case disposition data, it is important that these accurately reflect what is happening in the cases.

### UNFOUNDED

Although not necessary for closing a case as 'unfounded', it seems to be the practice to obtain a withdrawal statement in such cases. In one of these cases the complainant admitted that the report was false. In another, the 15-year-old complainant, who was mentally impaired, had been molested and thought that she had been raped. In both this case and a case involving the possible rape of a two-month-old baby, the medical examination confirmed that there had been no interference. In the remaining three cases the complainant claimed that she was too drunk to know whether she had in fact been raped:

I have since then thought about what happened that day. I came to the conclusion that I drank very much that day. I also realised that I might have given consent to [the accused] to have sex. I cannot recall the full details of what happened that day and feel that because I am not 100 per cent sure I feel that I should withdraw the case.

Also:

The more I think about the incident the more I realised that I might be mistaking by saying I was raped. I wish to

withdraw the allegations that I made but would like this matter re-opened should any concrete evidence come up to support such allegations.

This withdrawal statement suggests a link between evidence, or the lack thereof, and case withdrawal that becomes more pronounced when we look at the cases closed as 'undetected'. All of these withdrawal statements reflect ambivalence on the part of the complainant: a belief, never clearly articulated, that she was raped ('I might be mistaken ...', 'I'm not 100 per cent sure ...'), but an acknowledgment that it might be impossible to prove. One complainant asks, for example, that the case be re-opened should 'concrete evidence' come to light. It is doubtful that the complainants who wrote these withdrawal statements came to the realisation that their cases would be difficult to prove on their own. Does this mean that they were inappropriately influenced to withdraw their complaints? Probably not. Whether we like it or not, a potentially provable claim does require a relative degree of certainty about the underlying facts. But police officials can influence the degree to which a complainant feels that certainty ('Are you absolutely sure ...?') and can point out how, for example, alcohol use might diminish her credibility.

#### UNDETECTED

Four dockets were closed on the basis of a complainant withdrawal when it was clear that the reason for the withdrawal was in fact a failure to detect the suspect. 'Detection rates' are a key performance indicator upon which detectives and their commanders are evaluated. This is calculated by adding the total number of charges referred to court, charges withdrawn before court and charges closed as unfounded and dividing that total by the total number of charges investigated.<sup>384</sup> There is therefore potentially an incentive to close cases by means of a complainant withdrawal statement, rather than as 'undetected', which amounts to a 'failed investigation'.

There is a sense from these cases that complainant withdrawal statements provide a short-cut to closure, while deflecting responsibility for the decision onto complainants. These cases tie in with the concern that complainants are expected to investigate their own cases. In one case the complainant writes:

I would not be able to recognise the man who raped me ...  
I have made peace with what happened.

In another, described in the introduction to this book, she states that she is unable to identify the man who raped her or where the rape happened. As such:

I can ... provide no information to take this investigation forward.

In a four-page withdrawal statement, made four hours after the complaint was laid, another complainant explains that:

I feel very disappointed about this matter and don't want to continue with the case because I can't throw any light on the matter as far as the suspects are concerned. I also don't know if anyone saw what happened.

In one case the complainant did conduct her own investigation. She was raped at knife-point late one night, waiting at a bus stop. She did not report the rape and no medico-legal examination had been conducted. About two weeks later she climbed into a minibus taxi and saw the perpetrator. She told the taxi driver what had happened, and he provided her with the perpetrator's nickname and place of employment. She reported to the police and accompanied them to arrest the man. Two weeks after that she withdrew the complaint. One has a sense that being a weak case (late report, no corroboration) it was always going to be problematic, but closing the case did not require a withdrawal statement. Again, the sense is that if you get a complainant withdrawal statement you can effectively pass the buck to the complainant for making an unpopular decision.

\* \* \*

There is a disjuncture between the regulatory framework governing case withdrawals and the practice of closing cases at the confluence between broad police and prosecutorial discretion and the complex reality of complainant's daily lives. Complainant withdrawals are treated as a

critical reason for the state's failure to adequately prosecute sexual assault. Official statistics tend to support this contention, showing high numbers of cases leaving the system at the complainant's behest. But these statistics are unreliable: dockets are miscategorised and the extent of choice on the part of the complainant exaggerated. The cases in this chapter show that there are multiple, often inter-relating factors that impact on a complainant's decision to withdraw from the process. Other parties have a profound influence on complainant decision-making, including families, the police and prosecutors. Police, in particular, can nudge complainants towards withdrawing, often simply by their inaction.

There are few questions asked when a victim withdraws her complaint. On the stereotype it is so predictable and the reasons so obvious that it requires no clarification. At least, that's how it seems. There is a marked absence of reasons in the withdrawal statements. And where there are reasons, no clarification is sought about socio-economic vulnerability, perceptions that the police are unable to offer protection against the accused, or about the safety of the children who witnessed their mother being raped. In a context of excessive workloads and complex cases it is easier to acquiesce with complainant 'choices' even where choice is coerced and constrained. After all, these are complainants who are not interested, who haven't helped with the investigation and who are fickle, as rape complainants are.

Case withdrawals confront us with the complexity of the engagement between victims and the criminal justice system. At times, we see genuine concern for the well-being of the victim and the imperative to build a strong case. On the other side, a lack of knowledge/skills/training, stereotyping, bad practices and institutionalised shortcuts all come together to undermine the credibility of the criminal justice system.

## CHAPTER 7

# False Complaints

false: untrue • fallacious • concocted • fabricated • unfounded  
• spurious • fraudulent

It is not surprising that when it comes to explaining attrition in rape cases the high prevalence of false reporting is one of the most common reasons provided by police officers.<sup>385</sup> For centuries the state's response to rape has been centred on the premise that women lie about their sexual victimisation. Although this has become less articulate over time, criminal justice responses the world over continue to reflect deep-seated suspicion of the motives behind a rape complaint. Women are variously described as vengeful and vexatious trollops, bent on exacting revenge against errant partners,<sup>386</sup> or as good girls gone bad, regretful of or needing to explain an inappropriate sexual liaison or an unplanned pregnancy.<sup>387</sup> As a leading international scholar summarises: '[a]ll research involving police officers finds that the issue of false reports is at the forefront of their minds at the time of the initial report'.<sup>388</sup>

It has been a central concern of feminist activists to debunk the conception that women lie about being raped. The view that rape victims inherently lack credibility—in that they sometimes lie about being raped and often dissemble about whether they want sex or not—has underpinned, among others, the cautionary rule applied to their evidence in trial and negative inferences drawn from delayed reporting. Across Anglo-American jurisdictions feminist legal scholars have advocated for reforms to many of these laws, emphasising that rape victims are no less credible than any other category of complainant. The empirical debate has been largely been about quantum. How many rape complainants lie? The point has become one of 'proving' that the number of false rape complaints is no more than equivalent (or not, depending on where you stand in the debate) to other offences. Phillip Rumney provides a useful summary of findings from 20 of these studies on false reporting. Sample sizes ranged from 18 to 2 643 cases and the false reporting rates from

1.5 per cent to 90 per cent.<sup>389</sup> Likewise, widely cited comparative research on this topic from the United States reflects false reporting rates that include 2 per cent, 8 per cent and 41 per cent.<sup>390</sup> It is almost impossible to test the extent to which any of them is empirically valid. Instead, these studies illustrate the futility of trying to assess what is ultimately a highly contextualised qualitative set of questions—why do rape complainants lie? what do they lie about? and under what circumstances?—in quantitative terms. They also tell us nothing about how the criminal justice system frames the validity of a rape complaint and the credibility of a complainant, questions which lie at the heart of allegations that women lie about being raped. Any useful investigation of false complaints therefore has to go beyond the question of how many women are lying, or what Jan Jordan calls the binary of ‘women always lie’ and ‘women never lie’ to understand the context in which such cases might arise.<sup>391</sup> Jan Jordan is of the few scholars to have attempted to systematically deal with police claims of false rape reporting and has looked at police perceptions of credibility in New Zealand.<sup>392</sup> The most nuanced work on this topic has come from scholars in the social sciences—anthropology, psychology and criminology—who have pointed to the inter-related institutional and systemic reasons why a complaint may be designated as ‘false’ and to the complex personal reasons why someone would make such a complaint.<sup>393</sup> They have drawn attention to contextual issues, including a history of domestic and interpersonal violence and prior victimisation at the hands of the accused or in other circumstances.<sup>394</sup> They also draw attention to the fact that it is sometimes not the alleged victim that lays a ‘false complaint’, but someone else, either against the wishes of the victim or because they have incorrectly assumed from her physical state that she was raped.<sup>395</sup> In the same way, police officers may assume that a victim was raped when she was in fact ‘indecently assaulted’, resulting in the later reclassification of that case. Rumney describes these cases as ‘technically false’.<sup>396</sup> Whether they are then classified as ‘false’ depends on the police classification system and practices.<sup>397</sup> Clearly, not all ‘false complaints’ are false *per se* or maliciously motivated. In this chapter I consider a set of cases that could be determined to be ‘false’, setting out how that determination was made,

what detectives say about the prevalence and reasons for false complaints and some detail of cases where the truth of the complaint is in question.

### Defining false complaints

How 'false complaints' are defined is one of the key methodological reasons for the wide disparity in statistics. Rumney points to the general lack of reliable criteria for vetting police records, so that it is difficult to know how many reported rapes are genuinely false.<sup>398</sup> But how might this limitation be remedied? Do we add up all the cases that are classified by the police as unfounded? Of the 132 Western Cape cases, only one was classified as unfounded, while police are adamant in conversation that at least half the cases they see are false. So 'unfounded cases' is obviously not a particularly useful category. Do we include cases where the police are 'certain' that no rape occurred? Not unless we are sure that their evaluation of the evidence is not founded on stereotypical conceptions of what constitutes a rape victim and what amounts to rape. What about all the cases where the complainant says she lied? Even where the complainant says that she was not raped, this on its own cannot provide absolute certainty that no rape occurred. Kanin's 41 per cent 'false' reporting figure is derived from a jurisdiction where complainants were allowed to withdraw their criminal complaints only if they recanted.<sup>399</sup> Rape Crisis counsellors recount stories of young girls who, not wanting to tell the police that they have been compensated by the perpetrator, just say they weren't raped. This might make them liars, but the point is that they didn't lie about being raped. And, even when a girl says that sex was consensual, below a certain age we disregard that consent, so that a 14-year-old who recants her complaint on the basis that sex was consensual has still been a victim of a statutorily defined crime prohibiting sex with children under the age of 16.<sup>400</sup> The point is not that we can never adequately operationalise what we mean by a false complaint (I certainly attempt to do this below)—but that this needs to be done with circumspection, paying close attention to the facts of each case.<sup>401</sup> With this extended caveat in mind, I have drawn on the work of Jules Epstein and Jan Jordan to establish a working definition.



Epstein emphasises the importance of drawing a narrow definition of 'false' allegations, so as to include only cases where there has been no sexual offence committed by the accused.<sup>402</sup> This would pertain, in his view, where a rape was reported and there was no sexual conduct at all or the sexual encounter was consensual; or where an accusation was made against a particular person when the complainant knew that her assailant was someone else. What this definition usefully does is to draw attention back to the offence itself and away from the surrounding circumstances. It removes from the equation falsehoods that a complainant may tell in an attempt to boost her credibility, about such contextual factors as whether she had been drinking, using drugs, or consorting with the perpetrator prior to or at the time of the rape. This provides a good starting point for analysing the contents of rape dockets.

Struggling with the problem of how one determines, *post hoc*, that a detective perceived a complaint to be false—and how one distinguishes this perception from a generally sceptical demeanour towards rape complainants—Jan Jordan adopted the following four broad categories to guide her own assessment: genuine; possibly true/possibly false; cases the police said were false; cases the complainant said were false. Cases falling into the last two categories required an unequivocal indication from the police or the complainant that sex either did not occur or was consensual. This takes us beyond Epstein's definition by allowing for a consideration of the perceptions that inform police determinations of mendacity and the application of their discretion to dispose of a case as unfounded. For me, it is useful then to combine the approaches taken by Epstein and Jordan and to treat as false only those where the police or complainant have unequivocally stated that sex did not occur, was consensual, or was entered into with someone other than the accused. This definition is also consonant with the South African Police Service (SAPS) Standing Orders on the Closing of Case Dockets, which determines that a case may only be disposed of as *unfounded* 'when the investigation clearly discloses that an offence has not been committed.'<sup>403</sup>

## Malice and instrumentality: How police perceive false complaints

Police officers are adamant that the majority of cases they deal with are false complaints. One detective, who has been investigating rape cases for more than a decade, went so far as to say that 'we don't have genuine rape cases here', eventually conceding that maybe two cases a month are genuine, but that those are likely to involve child victims. The remainder of police officers I interviewed all estimated that 40-50 per cent of the cases reported to them are false.

Asked to elaborate, they said that women lie about being raped for the following reasons: to spite their partners for being unfaithful; to gain some leverage in divorce, custody or maintenance disputes; to gain access to an abortion;<sup>404</sup> to obtain post-exposure prophylaxis for pregnancy or HIV after having consensual unprotected sex, particularly in the case of young girls and sex workers;<sup>405</sup> and, in the case of sex workers, to punish clients who refuse to pay or to use a condom.<sup>406</sup> Alarm bells ring, according to detectives, when a complainant says that she 'can't remember' various details of the attack, when she cannot provide contact details (for example, claiming that she does not have a phone and giving a friend's phone number), does not want the police to take her home, and doesn't make eye contact or otherwise acts 'inappropriately' during the interview. One detective said that 'you can see when someone is serious', referring to a case where the complainant 'was just laughing all the time' while she was giving her statement, as one that was obviously false. Another detective said that he simply relied on instinct and experience:

*We as officers can see the difference where and when a woman has really been raped and where she's making it up.*

Given the longstanding mythology of malevolent women who use a rape complaint to exact vengeance, it is interesting to note that only one of the motivations proposed by detectives in my conversations with them, spiting an unfaithful partner, is intrinsically malicious. The other motives seem far more instrumental in nature. They involve leveraging access to services

(such as post-exposure prophylaxis or abortions) or—as far-fetched as this might seem—access to justice, at least in the sense that the party feels legitimately aggrieved.

## Back to the numbers

Using the narrow criteria described above I identified 15 cases that were unequivocally claimed by the police or complainant to be false, despite the fact that only one of these cases was explicitly disposed of by the police as unfounded.<sup>407</sup> The age of the complainant proved to be an important factor in these cases. Five cases involved complainants over the age of 16. One related to a two-month-old baby. Two of the five adult cases involved sex workers. One involved a woman with serious mental health problems. The remaining nine cases all involved girls between the age of 12 and 16 years. Although this coincides with earlier findings by the SAPS Crime Information Analysis Centre<sup>408</sup>—and anecdotal evidence from detectives themselves—that ‘young girls lie’, it is important to remember that the category of 12-16 years was very deliberately used because sex between these ages is deemed by statute to be unlawful, regardless of whether the minor consented.<sup>409</sup> What follows below is a description of the personal and systemic considerations that seem to factor into the disposition of these cases.

## Scratching beneath the surface

### PRIOR VICTIMISATION

In some cases the reasons for making the complaint are obvious and the motives fairly transparent. In other cases the context provides a layer of complication that, if it can be uncovered at all, points to more victimisation and abuse. What we see beneath the surface supports the contention that underlying issues regarding prior victimisation may play a role in motivating unsupported complaints.<sup>410</sup> In one case, the mother of a two-month-old baby reported that her child had been raped. The mother’s stepfather was left to look after the baby while she went to look

for work. When she returned home she couldn't get the door open and, on calling out, was told by her stepfather that the child was sleeping. As soon as she got inside the shack she rushed to the baby and immediately looked at her vagina, noticing that 'the hole was bigger' and that there was a white discharge that looked like semen. She rushed the baby to hospital, where a nurse told her that the child had definitely been raped and that she should go to the police, which she did. The ensuing medical examination showed 'no physical evidence of any penetrative injury'.

Why would she lie about something like this? Her panicked state belies any malicious intent and she withdrew the complaint immediately after speaking with the doctor. Some insight is to be gleaned from her initial statement in which she sets out the events above and concludes of her stepfather that 'he raped my daughter just like he raped me when I was 12 years old'.

### THIRD PARTY REPORTS

One of the reasons identified for apparent false complaints is that another person insisted on or laid the complaint on the victim's behalf, a view supported by the detectives I spoke to, who suggested that withdrawals often ensued in cases where it was not the complainant's decision to report:

*It wasn't on her mind to open a case but the constable insisted, or the trauma counsellor, or her mother.*

In nine cases a third party either insisted on the complainant going to the police or made the complaint on her behalf. In three of the cases the mother of the victim laid the complaint and in two cases the complaint was laid by the biological father. One each was made by a guardian, a friend's mother, a doctor and a boyfriend. In the last case, involving a woman in her forties, the investigating officer wrote in the investigation diary:

... the boyfriend pressurised the complainant to lay a charge of rape. This was due to the fact that the suspects named by the complainant are now mocking her boyfriend that they slept with her, but the complainant insists nothing happened ...

It was clear from the various statements made by and attributed to the complainant in the docket that she was extremely ambivalent about the case and, because of the extent of her inebriation at the time, not at all certain whether she had been raped or not. In other cases the coercion is explicit. A 17-year-old complainant writes:

The reason for me to lay the charge of rape is that I was scared that my parents will hit me.

In KZN a 15-year-old complainant withdrew her complaint on the basis that:

I'm in love with the suspect in this matter. He did not rape me, I have sexual intercourse with him on my consent. The reason for me to lay the charge of rape is that I was scared that my parents will hit me.

According to the investigation diary, it was only when the two families met to discuss the rape complaint that the complainant's parents became aware of this consensual relationship.

#### ADOLESCENCE

Nine cases involved adolescents. There is an understandable ambivalence regarding the regulation of adolescent sexuality, the age at which sex and other forms of sexual experimentation should be considered legal, access to contraception and termination of pregnancy, and the age gap that should exist between the parties to warrant prosecution.<sup>411</sup> As leading South African criminal law scholars, Jonathan Burchell and John Milton, argue, while the rationale behind such a prohibition is to protect girls from sexual exploitation by adults, the effect is very often 'to outlaw also a sexual relationship between young lovers who freely and voluntarily engage in sexual intercourse'.<sup>412</sup> Adolescents are also a historically suspect category of complainants. As far as debates about the age of consent apply to adolescent sexuality, they raise normative issues, with strong sub-cultural undertones, about when it is considered appropriate 'in certain communities' to start having sex. It is difficult not to view the response of one police respondent as underpinning what appears to be a

policy of non-enforcement of statutory rape laws, when he tells us that in 'coloured communities':

*... the difference between whether a 14 year old had a good time and whether she was raped is if her mother was awake when she got home at four in the morning.*

Debates about teenage sexuality lose traction the greater the age gap between complainant and alleged suspect, and the more obviously coercive the context. One case illustrates this point well. A 13-year-old was at a recreation area with a group of people, where they were drinking large amounts of neat vodka. At some point she 'wandered off' and had 'consensual' sex with two men, both in their twenties. That she had sex with the men was corroborated by a number of witness statements and the suspects' arrest statements. The victim claimed, and this was corroborated by the findings of the medical examination, that she was a virgin at the time.\* Her father reported the case. Putting aside for the moment the question of whether the victim was in fact capable of consenting to sex given her state of inebriation, this is a clear-cut case, complete with admissions of guilt, of statutory rape. And yet it was not prosecuted, with the only reason provided being that the victim has admitted that the sex was consensual. In other words, her admission of 'consent' negates the rape complaint in its entirety, regardless of the legislative intention that consent should, in general, not be available as a defence when one of the parties is under the age of 16.<sup>413</sup>

Four of the nine cases involving adolescents were opened after a parent or caregiver found out that the complainant was pregnant. Three of the girls were 14 years old and one was 15. All of these cases were opened on the insistence of someone else and against the wishes of the victims. In three of the cases the girls claimed from the outset that sex was consensual. Only one claimed to have been raped.<sup>414</sup> For example, in one case the mother of a 14-year-old found out that she was pregnant from a relationship with an older man (whose age is unknown). The doctor who confirmed the pregnancy alerted the police. The mother then

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\* Finding: 'Some swelling; with fresh tears. Recent intercourse in woman with previously intact hymen.'

took her daughter to the police station to lay a charge, where the victim explained that she had consented to sex and was in love with the perpetrator at the time. When the investigating officer visited the victim's home he was told by the neighbour that her parents had taken her to the Transkei (Eastern Cape) and that they were not coming back.

In another case, also involving a 14-year-old who was four weeks pregnant, she made it clear that she and her 19-year-old boyfriend were in a long-term relationship. Three weeks after the complaint was made the investigating officer contacted the complainant telephonically. He reported that

She lives in Johannesburg and has already had an abortion.  
She informed me that she doesn't want a case.

The case was closed 'withdrawn complainant'.

This category of cases is summed up by the withdrawal statement found in a docket involving a 15-year-old girl who laid a complaint at her mother's insistence when she disclosed that she was pregnant. Her withdrawal statement, signed two hours after the initial complaint was made, states:

I don't want to make a case against [the alleged perpetrator], but my parents insisted. [The alleged perpetrator] and I had a relationship and he asked my parents to be my boyfriend. They told us to wait. I have known [him] for more than 4 years and this was not the first time we had sex. He did not threaten me to have sex with him at all. I did it of my own free will. Although I am expecting his baby I feel that he must go on with his life and me with mine. I will not have an abortion and plan to keep the baby. I also don't want to go to court with this case.

The difficulties of pursuing a prosecution for rape in these cases are obvious and it is certainly not always appropriate to prosecute cases of consensual sexual intercourse where one of the parties is under the age of 16. However, sex between an older man and a child under the age of 16 is unlawful, and in not one of these cases was a prosecution for

statutory rape pursued, despite clear and compelling evidence that sexual intercourse had occurred between the girls and the men in question. There is absolutely no indication in these or any other of the dockets, approximately 20 per cent of which involve girls under the age of 16, that this was even considered. On the contrary, detectives and prosecutors say that prosecuting statutory rape is 'not worth the effort' in terms of the likelihood of criminal sanction. Because these cases are invariably declined for prosecution, detectives say that they are not worth investigating.<sup>415</sup> And, as one detective put it to me: *'it's not really rape'*. This means that adult men who engage in 'consensual' sexual relations with girls as young as 13 years are not sanctioned, which negates any policy or legislative imperative that might be in place to protect adolescents from inappropriate early sexual experiences.

#### MENTAL HEALTH PROBLEMS

Although mental health problems make women particularly vulnerable to sexual victimisation, and their limited ability to consent to sexual intercourse is reflected in the law on sexual offences, the credibility of their complaints appears to be particularly suspect, precisely because of their disability.<sup>416</sup> Mental illness is invariably raised in the literature as one of the primary motivators behind false rape complaints.<sup>417</sup> The two 'false' reports involving women with mental health problems suggest that the criminal justice system is unable to deal with the challenges posed by the extreme vulnerability of women living with mental disabilities and their associated inability to provide a sufficiently coherent and credible account of their victimisation to found a valid claim worthy of investigation. These challenges are amply reflected in a case involving a 41-year-old woman, who went missing overnight. Her mother reported that, when she found her daughter,

[s]he was wandering and she was dirty. I noticed that the whole set of teeth was missing. She was in a state of devastation. I asked where she was and she started crying. She told me she had been raped by 5 men on the field ...

She took her daughter home and then to a doctor, who was not available. His receptionist told her to go to the police station. The detective on duty



failed to take a statement from the victim, telling her that she hadn't been raped. He told her that she was 'just a naughty child' and instructed her mother to take her home and give her a bath. While bathing her daughter the mother found that her panties were covered in blood. She took her back to the doctor. This time the doctor told her that he could not examine her daughter without permission from the police. She called the police station again and was told to bring her daughter in the following day, which she did. A different police officer took the complainant to see the district surgeon, where she was finally examined, the doctor concluding that her injuries were 'not incompatible with an allegation of a sexual assault as alleged'. Her demeanour was recorded as being 'overwrought, tearful and unable to answer questions'. The doctor also noted that she was schizophrenic and had been hospitalised on a number of occasions.

It is arguable that detectives cannot be expected to deal with the challenge that such a case poses without the support of mental health professionals. This is largely unavailable. One docket notes that it will take 10 months to get an appointment to have a complainant assessed by a non-governmental service provider. Detectives expressed their frustrations at this delay:

*Don't get me wrong, they [forensic social workers] are doing a good job, but I am not happy with them. I had a case of a 12 year old mentally handicapped child that was raped by some guy that the mother knew ... I sent a fax to the [social workers] explaining the circumstances that the child was living under, with an alcoholic mother who was never there, and the child prey to anyone ... That was more than two years ago and no response.*

At the same time, discussions with detectives throw up a stark discord between the recognition of vulnerability and the problem of 'how do we know she is telling the truth'? One suggested that the only way to get around this conundrum was to wait for the mental health assessment to determine whether the complainant was capable of distinguishing 'what is right and what is wrong'. By all accounts this would result in a lengthy delay. There seems, however, to be little of the same compunction in

accepting the recantation of a rape complaint by women who are mentally impaired. In the case of the 41-year-old woman described above, the detective notes:

Complainant won't say if she was raped. She is not deaf, dumb, stupid or retarded [original: doof, dom, stom of gestrem] and just refuses to speak. She stated after a while that she was not raped and just slept out.

On this basis he drafted a withdrawal statement on her behalf saying:

[The victim] denies she was raped and was just afraid because she slept out.

Given the vulnerability to sexual violence of women living with mental disabilities, the levels of disbelief and lack of support offered to such women is extremely problematic. This case illustrates how the sexual victimisation of disabled women is compounded by stigma, social isolation, dependency and a lack of skills in the criminal justice response, which results—ultimately—in her not being believed. It is an area that requires far more systemic support to the investigation than is currently available. The result of not being believed in such a context is that victims are not afforded protection by the state and that they are therefore put at further risk.

## SEX WORKERS

Sex workers are not credible to those in the police system. They are the archetypal 'bad victim', playing fast and loose with the criminal justice system, using it to collect bad debts or to teach clients who get rough a lesson. And, of course, they repeatedly precipitate their own victimisation.<sup>418</sup> Two of the 'false' cases involved sex workers. Although the fact that the complainants were sex workers appeared to be decisive of how these cases were treated, neither case supports the stereotypical conception of why sex workers would make a false rape complaint.<sup>419</sup> Both victims claimed to have been abducted from outside their homes and taken to a quiet side road where they were forcibly raped. In both cases the medical

examination confirmed injuries.\* Both women managed to escape and run to a busier road, where they were assisted by passers-by. In one case the complainant claimed that the perpetrator had held a gun to her head, all the while telling her that he hates women and won't think twice about shooting her. She told him that she would have sex with him if he didn't kill her. He raped her and then told her to get out of the car and run. If she looked back, he said, he would kill her. She was found almost naked and in shock alongside the road.

Although initially very sympathetic, the investigating officer spoke to the victim's aunt the following day and then noted in the docket:

It appears that A1 [the complainant] is a prostitute and that all above info is UNTRUE!

No evidentiary basis is provided for this rather unequivocal determination. Being a sex worker seems to be a sufficient basis for questioning the credibility of the complainant. Speaking to me specifically about how he knew that a complaint was false, a detective responded in similar vein:

*Often you drive around and you see the victim standing on the side of the road—then you realise she is a prostitute. And then you know ...*

The detective in the case described above went on, in the investigation diary, to critically evaluate the complainant's claim, questioning, in particular, why she was not able to provide the registration number of the car in which she was raped:

It is clear that when suspect threw her out of the car she had chance to take the number plate (REGISTRATION).

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\* In respect of the first victim, the medico-legal examination found: 'Few small vaginal tears. Ditto posterior fourchette. Anal exam: swelling/thickening. Very tender, difficult to examine. One abrasion to inside of left thigh, no other contusions or abrasions evident. Blood in vaginal vault + oozing from cervical os. Blood stained white fibrous material removed from vagina'. In respect of the second victim: 'Bleeding from vagina and cervix; erythema & tenderness over left maxilla; clinical findings could be consistent with history of rape'.

The case was closed six days after it was reported, with the approval of the prosecutor, and with no further recourse to the complainant. In the other case, the investigating officer similarly downplayed the fact that the complainant was a sex worker *per se*, but used the fact that she had not disclosed this to him as a basis for questioning the credibility of other aspects of her claim. He wrote in the investigation diary:

Seems like the victim is not very honest with me. She can't really say what she went to do outside at 04h15. According to the police at [the neighbouring station] she is a known prostitute. She does not mention any of that. It does not change the facts if she is, but the question is about the gun. Will speak to victim again.

This case was also closed within a week of the complaint being made. Perhaps it is exactly because of the perception that the police would not take a rape complaint made by a sex worker seriously that the complainants chose not to disclose the facts surrounding the incident. Or perhaps they simply did not see their mode of employment as relevant. But when it comes to determining the validity of a complaint the police do see sex work as relevant, regardless of whether it has any bearing on the substance of the complainant's claim.

Two further points about these cases are important to note. Contradicting the popular notion that sex workers lay false complaints against their clients, both perpetrators of these rapes were strangers. It is therefore difficult to conceive how these men, whose registration numbers the complainants were not even able to take down, could have been maliciously targeted by the complainants. It is difficult to perceive what benefit they could have hoped to gain by concocting an elaborate story, complete with injuries. On the contrary, and this is the second point, the similarities between these two stories, both involving sex workers who were abducted from the same general area to the same type of place and in similar circumstances, suggests the possibility that these rapes may have involved the same perpetrator, a consideration of which stereotypical assumptions about the motive for the reports may have blinded the investigating officers.

Even the perpetrator's protestations that the complainant is a sex worker can be sufficient to raise doubts. Coupled with other social markers, such as alcohol use, HIV status, and poverty, this can be fatal to the success of the case. In one case of this sort the prosecutor had reviewed the file early on and written:

Good case!! Caught red-handed!! Accused undefended!!

The complainant had been heard by witnesses and the police screaming for help and begging not to be killed. A policeman had apprehended a fleeing suspect, whom he had seen leaving the crime scene pulling up his pants. The complainant claimed that she had been raped by four men, who had accosted her while she was waiting at a bus stop. After giving a statement to a constable at 4 am she said that she did not want to make a case as the perpetrators would kill her. The constable wrote that she was 'strongly under the influence of alcohol', although no basis was given for this opinion. She later decided to continue with the case and was taken for a medical examination, which confirmed genital trauma. The medical report is also one of only two that references (obliquely in this case) the HIV status of the complainant, stating in large red letters at the top:

KNOWN TB PATIENT. IMMUNOSUPPRESSED.

The accused was in custody. Two days after the rape occurred in early June he made a statement to the effect that the complainant was a prostitute and that he and a friend were negotiating a price with her when 'the rapist' arrived and forced himself on her in their presence. As far-fetched as this scenario seems, the next entry in the investigation diary from the investigating officer to the public prosecutor notes that:

The possibility exists that this was not a rape.

No further explanation is given for this statement. One has to assume that the imputation that she was selling sex, coupled with her HIV status and apparent alcohol use, fatally undermined her credibility as a complainant.<sup>420</sup> The case was closed some 10 months later, with no further action taken, when the complainant could not be traced.

## TELLING LIES

The credibility of the complainant is central to any determination of whether a criminal case will ultimately succeed at trial. This is especially true in rape cases where there is likely to be little corroborative evidence, with the result that the complainant's testimony, as a single witness, is central to proving the complaint.<sup>421</sup> In the context of rape, 'bad witnesses' are those who make inconsistent statements and whose conduct suggests some level of victim precipitation, particularly where alcohol, drugs and sexual involvement with the alleged perpetrator is implied. Really bad witnesses are those who lie about these factors. But we should be looking carefully at the circumstances under which women who credibly claim to have been raped, subsequently claim to have lied.<sup>422</sup> Two cases were closed with specific reference to the fact that the complainant had lied. Both involve the possibility of intimidation and gang activity, providing a possible alternate explanation for apparent inconsistencies. In the first case, the 15-year-old complainant and a friend were using drugs at the perpetrator's house on the night of the rape. When they tried to leave they found the door locked. The perpetrator—suspected to be a member of the Bad Boys gang—assaulted the victim, saying that she now had to give him something in return for the drugs, or else he would kill her. Her friend claimed that she was in the room while the rape occurred and that the complainant was fighting and crying all the time. She also claimed that the sheet was covered in blood (the medical examination confirmed that the complainant was menstruating at the time). The complainant immediately reported the rape to the police and the medical examination concluded that there were 'findings of assault and recent sexual intercourse'. In other words, although it was not possible to tell conclusively from the examination that she had been raped, it was possible to surmise that sex happened within a coercive context in which she was subjected to a physical assault. Some weeks later the witness reported to the police that she had been assaulted by a friend of the perpetrator, and told that if the case was not withdrawn she would be killed. The complainant reported similar death threats. The case was closed abruptly with a note from the prosecutor that the complainant had deviated substantially from her statement. Written boldly across a number of lines in the investigation diary is the note:

## VERY BAD WITNESS AND CASE!!

The investigating officer followed up with the annotation:

Case withdrawn because the complainant lied.

It is not clear from the docket what the complainant lied about. It is important to draw a distinction between lying about the surrounding circumstances and lying about the key elements of the offence. Criminal justice actors often seem to muddle the two. While the outcome might ultimately be the same: the complainant lied, ergo she is not a credible witness and the case should be dropped, these must be kept conceptually separate. In a rape case the question is essentially whether there was sexual penetration and whether the complainant consented to participate. Interestingly enough, in this case the detective seemed to have had no reservations about the validity of the claim, obtaining witness statements and visiting the crime scene. The prosecutor in the case was the one who determined that the complainant was a 'bad witness'. Unfortunately she gave no reasons for this decision. There is also no record that anything was done to follow up on the threats. This is not entirely surprising, given that the investigating officers were unanimous in their assessment that victims generally overstate the threat they are under. *'Sometimes she comes with stories: "She's scared". We always just make a note in case we have to please explain ...'* said one detective. For the most part, they suggested, these threats are not meant seriously or, as another detective put it 'the bark is usually worse than the bite'.

When the prosecutor writes 'very bad witness' in the context of a rape case, she is actually writing 'very bad victim'. As far as one can really make these determinations on such scanty evidence, she's probably correct that this complainant is a 'bad girl'. She is a 15-year-old, who has dropped out of school, hangs out with gangsters and uses drugs. The medical examination confirms that she was not a virgin when she was raped and might well, according to the medical report, have had a sexually transmitted infection at the time. There is no reference in the docket to her parents. She put herself in a very vulnerable situation. This is certainly not a victim who would immediately elicit sympathy, and yet it is noteworthy that the case was well investigated. Did the complainant

lie about being raped? Unlikely, given the facts described above. But it is likely that she was sufficiently street-smart to take the threats against her seriously and to do and say whatever was needed to disengage from a process that she had come to see as putting her at risk.

Men who rape understand perfectly well the need to impugn complainant credibility. In fact, one of the reasons why the category of 'acquaintance' rape is so contested is because the advent of DNA testing has changed the contexts in which women are raped. With the space for a defence of mistaken identity closing down, creating the impression that the complainant might have consented to sex has become a more prevalent rape defence strategy. This often means creating the impression of a prior relationship. Rape Crisis counsellors have noted the use of this strategy: a young man and his friends wait at the bus stop or on a street corner by which the potential victim must pass. He calls out to her every time she passes—publicly telling her how beautiful she is, asking her to be his girlfriend. He refers to her as his girlfriend. She ignores him; sometimes she makes a comment or two in passing. This carries on for a month or so and then he rapes her. When she complains about being raped, everyone says 'Oh, they had something going on ... I think she was his girlfriend'.<sup>423</sup> This seems to have been the strategy employed in the case of a 14-year-old complainant, who alleged that the 25-year-old perpetrator had dragged her to his home, where he raped her, threatening her with torture. Her statement said that she was 'terrified of him'. Community members claimed she was his 'girlfriend'. He claimed that they had a relationship 'a few years back' (remember that she was only 14 when this report was made) which he had ended. She had arrived at his home, he claimed, drunk, rude and noisy, in the middle of the night, saying that she wanted him back. The medical examination, done on the same day, found evidence of an assault and no evidence of drugs or alcohol, describing the victim as 'brave and controlled'.<sup>424</sup> No effort was made to investigate the case. When the investigating officer eventually tried to contact the complainant three months after the rape, he was told by a neighbour that she no longer lived with her mother because 'the mother found out that the victim had lied about the rape and sent her away'. The case was closed on this basis.

Again, there is no indication of what the complainant lied about and no corroboration of the neighbour's story. No contact was made with the



mother or the complainant. Simply saying 'she lied' in a context where the possibility has already been raised that the victim was actually a 'girlfriend' appears to be sufficient to tilt the scales of justice against her. No matter that she was only 14 years old.

In two cases it was apparent that the complainant consciously fabricated a rape story. In the first, the complainant writes in her withdrawal statement that the accused is the father of her baby and that she opened the case 'because I found him with another female in the room'. The second complainant made up the story that they had slept together, which she reported three weeks after the rape allegedly occurred because she was afraid that the suspect would tell her boyfriend, who was in jail at the time. While the first case smacks of retribution, the second, which was blatantly false, still shows more signs of self-protection than spite.

If false rape complaints are as prevalent as suggested by detectives, the obvious question for a lawyer must surely be why these lying complainants are not charged with perjury or defeating the ends of justice when their lies are exposed or when they recant. Certainly this is the position taken by the South African Law Reform Commission's Project on Sexual Offences which, responding to the widespread perception of false reporting, recommended that rape complainants be charged for 'laying false charges, making false statements, obstructing the course of justice and perjury'.<sup>425</sup> Not one case I saw showed any indication that this course of action had been contemplated. Interviews with detectives reveal, however, that the 'punishment' of dissembling complainants is a key issue for them and the courts' failure to impose sufficiently serious sanctions a source of great frustration. As a result, they suggest grimly that 'it is not worth the bother'.

Detectives point out that complainants both 'waste our time' and cause untold stress to the men they have falsely accused. Every single one of the Western Cape detectives interviewed told me the same story to illustrate the problem: The complainant was a married woman who had a child from a previous relationship. She went out with the child's father one night and didn't return home until the next day. Confronted by her husband, she told him that the man had kidnapped and raped her. He insisted that she report the matter to the police—the man was arrested and spent the night in prison. He told the police that, among other

things, they had stopped at a petrol station to buy cigarettes and soft drinks during the night. The detective obtained video footage from the petrol station, which showed that she was freely in the suspect's company. The man was released and she was charged with perjury. At court she was cautioned and discharged. Commenting on the case, one detective pointed out that the man was facing 15 years in jail and by comparison with this severe sanction '*she should at least have gotten a fine*'. The cases in this chapter show the difficulty of determining what amounts to a false complaint and the complex situational factors that might mediate the culpability of the women who make such complaints. What strikes me about this story, retold to me so many times, is the critical importance of good police work in benefiting both complainants and the men against whom they have levelled allegations of rape. The best protection against false complaints is good investigative practice, which is thorough and follows up evidentiary leads, such as the video footage described above.

\* \* \*

The credibility of rape complainants is a central theme running through all discourses on the subject of rape. Claims that women make false reports of rape go back centuries and the notion that they do so is strongly entrenched among those tasked with investigating their complaints. As Jordan suggests, '(i)ssues of belief, "truth"', and credibility occupy highly contested territory, and reflect the tensions and ambiguities surrounding women's sexuality and men's violence'.<sup>426</sup> Police approach rape complaints with scepticism. The literature on the question of false rape allegations is surprisingly lacking in substance, given the intense emotions that this subject elicits on both sides of the ideological gender-fence<sup>427</sup> and the impact that it has undoubtedly had on shaping both historical and contemporary jurisprudence and legal debates on rape.<sup>428</sup> The validity of the claim that women abuse the criminal justice system is important to those who seek to root out rape myths and stereotypes from the criminal justice system, and is strongly disputed by those who feel that reforms to rape laws and the rise of a strong women's movement have put men at further risk of false complaints.<sup>429</sup> But studies that focus solely on quantifying the extent of this 'problem' provide little assistance to us in understanding this phenomenon.

The cases described here provide a useful qualitative insight into the circumstances in which an unfounded complaint might be made. They should not be read as reflecting the prevalence of 'false complaints' in this study. Rather, they are cases that, on a particular definition, drawn from the literature and reflected in the SAPS Standing Orders on the Closing of Dockets, could be classified as 'unfounded'. The cases show that false allegations occur in more complex contexts and are often informed by more diffuse motivations than simplistic and stereotypical accounts would suggest. They also show how a confluence of factors may influence how the police approach a case and their consequent exercise of discretion in deeming it to be 'false'. And, they emphasise that, as much as there may be complex reasons why someone would make a false complaint, there is inevitably an equally complex context in which complainants recant.

## CHAPTER 8

# Refractory Systems

refractory: obstinate • unruly • unresponsive  
• unmanageable • resistant • stubborn

The handling of rape victims by the police has been analogised by scholars and rape activists to the experience of the rape itself, with the term 'secondary victimisation' routinely used to describe this treatment and its effect on complainants.<sup>430</sup> Police responses to rape reports have been closely linked to their stereotypical views of rape and leave complainants feeling disbelieved and unsupported.<sup>431</sup> These feelings have in turn been associated with victim decisions not to report or to withdraw from the criminal justice process. Much emphasis has therefore been placed on improving the reporting experience, both in South Africa and abroad. Such initiatives include extensive training aimed at shifting police attitudes, increasing the number of female police officers available to take statements, the provision of victim support rooms, where statements can be taken in private, and trauma counselling.<sup>432</sup> In other words, the focus has been on providing empathetic victim services.

Some scholars have sought to move the debate towards questions of administrative efficiency and to emphasise in this way the rational nature of police decision-making practices (without commenting on whether or not these decisions are necessarily appropriate or correct). This is a useful corrective. However, reliance on rationality and the underlying assumption of administrative efficiency and coherence may be unduly optimistic when we are talking about an institution, like the South African Police Service (SAPS), that does not share the settled processes and oversight mechanisms of the criminal justice systems in which these studies are typically conducted.

There may also be a misplaced conception that if rules are in place to guide discretionary decisions or even to exclude them, there will be little room for police officers to make inappropriate decisions to close cases. We have seen how victim agency is constrained by both personal

circumstances and systemic expectations. I have made the point that detectives have exaggerated expectations about how complainants should behave in order for them to *retain* credibility once they have entered the system, even if they accept the validity of the complainant's claim to have been victimised. At the most extreme, police perceptions of complainant recalcitrance result in profound scepticism regarding the veracity of rape complaints and a remarkable willingness to treat such complaints as completely baseless. In this chapter I look at what 'the system' offers complainants in return.

### The regulatory framework

Communication between a rape complainant and the officer investigating her case is critical to the investigation and, perhaps more pertinently for our purposes, her sense of safety and her faith in the ability of the criminal justice system. The SAPS National Instruction 3/2008 on Sexual Offences recognises this as a core function of the investigating officer. It sets out seven actions to be taken once the detective has been advised of a sexual offence.<sup>433</sup> These are to: take charge of the investigation; inform the victim of procedures; ensure the safety of a child victim; obtain information from the victim; take the in-depth statement of the victim once she has recuperated sufficiently; submit a statement with regard to the crime scene; and keep the victim informed of the progress of the investigation.

Two of these actions involve imparting information to the victim. The investigating officer is further required to 'explain to the victim the role of the investigating officer and how he or she will assist the victim'.<sup>434</sup> Critically, the detective is admonished to 'keep the victim informed of the progress of the investigation (e.g. if the suspect is arrested, released on bail, dates of appearance in court)'; record 'details of all contacts by the investigating officer with the victim' in the investigation diary, including 'date, time and place of contact and whether this was in person, telephonically or in writing'; and inform the victim of the investigating officer's contact details, including inviting the victim 'to contact the investigating officer'.<sup>435</sup>

## Police work

### THE BASICS

Because rape cases are so reliant on the testimony of victims, consistency and corroboration are key elements in the construction of a strong evidentiary record. A victim's statement must be accurate and complete so that there are fewer inconsistencies for the defence to assail and more circumstantial information that can be corroborated to support her credibility in general, even if there were no witnesses to the offence itself. In the ordinary course of events, one would therefore expect to see at least a complainant statement, medical report and first witness report in a rape docket. The presence of these statements also provides a broad indicator of the effort put into an investigation. Only four of the Western Cape dockets did not contain a complainant's statement and in each case the circumstances were such that it could not have been obtained before the case was closed. An example would be where the docket was opened on the basis of the police officer's report while the complainant was receiving medical attention, but she then indicated that she did not want to press charges.

The evidence of the 'first witness'—the person to whom the complainant first reported the offence—is a critical aspect of the rape trial. Although the 'hue and cry' rule of received English common law, requiring evidence that the victim had loudly and publicly lamented her sexual violation, has been thoroughly discredited, the circumstances under which she first reported the offence and the contents of that report remain an important corroborative element, reinforcing the veracity of her claim, which may be admitted at trial.<sup>436</sup> Unfortunately the lack of such a complaint can also be seen as an indication that the offence was not committed or had little impact on the victim.<sup>437</sup> It is therefore extremely problematic that nearly half (49 per cent) of the Western Cape dockets contained no first witness reports.

Medical evidence should not only be present, but should ideally provide further corroboration of the attack where this is available, by focusing not only on the genitalia, but also on other injuries (for example, where the complainant says that she was dragged along the ground, it is important to document injuries that fit this description). Eighty per cent

of the Western Cape dockets and 92 per cent of the KwaZulu-Natal dockets contained medical reports. With a few very problematic exceptions, complainants were taken to receive medical treatment within a short time (between one and four hours) after reporting. It appeared that in at least five cases detectives had followed best practice of ensuring medical attention was received and the victim stabilised before taking her statement.<sup>438</sup>

#### VICTIM EXPERIENCES OF REPORTING

Given the often-expressed concerns about police responses to rape complaints, it is interesting to note that of the 357 victims who indicated to Rape Crisis counsellors that they had reported being raped, a substantial 43 per cent had a positive view of the police.<sup>439</sup> A further 28 per cent were neutral in their response, while 29 per cent reported that this had been a negative experience for them.<sup>440</sup>

Positive victim reports centred largely on police attitudes when the rape was reported.<sup>441</sup> It was reported by complainants that they were handled with 'kindness', that the police were 'supportive and sensitive', 'extremely helpful', 'patient and friendly', 'understanding', 'kind' and 'respectful'. One victim reported that 'the police were fantastic'. Sometimes these acts of 'kindness' were further explained: 'the police gave her food to eat', 'took her to her ex-partner's home to fetch her belongings', 'explained what had happened [to her] to her husband' (for which 'the husband was thankful for their kindness').

Other factors noted as positive related more directly to front-end 'police-work'. Victims reported positive views of the police when they were 'prompt' in dealing with the report, took them to a private room to make a statement, 'called her at home to get more details and to see how she was' and generally made her 'feel like their top priority'. Male and female officers were equally praised in the reports. The following comment best reflects the ideal of the initial police responses to rape:

Police were efficient, excellent, never made her feel to blame, very nice and sensitive, and treated her well.

Not surprisingly, negative statements relating to police attitudes were the exact converse of these positive experiences. Those victims reported that

the police were 'not very empathetic', 'impatient and unsympathetic', 'seemed to disbelieve her', 'didn't seem interested in her story and made (her) feel guilty about what happened' and were 'very rude'. While in some cases this dissatisfaction can be attributed to a disjuncture between the affective responses that victims were looking for from the police and the response they got, in other cases the stereotyping is more explicit. For example, the detective 'said the perpetrator didn't look like a rapist' or 'seemed to think that the client knew the perpetrators and that the encounter was consensual' or 'said she was 'asking for it because of her school outfit' or 'told her she was drunk and wouldn't accept the charge'. Just as with positive reports, negative reports about police attitudes seem fairly equally split between male and female officers, although the important point was made by some victims that they felt 'uncomfortable' reporting to a male officer, regardless of his demeanour. On a number of occasions, victims reported that their first encounter with the police was with a person who was 'rude', 'insensitive' or 'flippant', but that the person they dealt with subsequently was 'nice', 'caring' and supportive'. It is probable that the second person was the detective and the first the junior police officer who took the initial statement in the community service centre where the rape was reported.

#### STATEMENT-TAKING

The police are under an obligation to take a statement from all victims wishing to make a complaint. The National Instructions state in that:

Any member receiving a report that a sexual offence has allegedly been committed against any person, must always view the report in a very serious light and must pay immediate attention thereto, irrespective of how long ago (before the report) the offence was allegedly committed or in which station area it was allegedly committed. No victim may be turned away simply because the alleged offence took place a long time ago or was allegedly committed in the station area of another police station.

The experience of Rape Crisis clients reinforces the importance of this instruction. A number of entries note only that the victim 'tried to report, but complaint not accepted'. Others are more specific, stating for example



that police 'would not let her open a case without a medical report, a witness, and a statement from her mother'. Victims were told they could not open cases because they did not have forensic reports, had taken too long to report the case, were in the wrong jurisdiction, or that they were lying. One victim was turned away from two police stations because she was apparently drunk. A number of victims reported 'being forced to give a statement in front of an audience', over the counter or in the reception area rather than in a private room. One said that she was embarrassed because the police officer who took her statement spoke so loudly that everyone could hear what was being said. The impact of such tactlessness can be seen in another report, where the victim,

... went to the police station soon after the rape to report it but while she was waiting she overheard another survivor being questioned by the police. She did not like the questions the police were asking, so she left without making a report.

Contradictions between victim statements and their subsequent oral accounts, whether at consultation with the prosecutor or in court, were identified by the detectives I interviewed as one of the most important factors impacting on victim credibility. You would think that every effort would therefore be made to ensure that the complainant's statement is taken down in a manner that ensures it is as accurate and complete a record of the complainant's experience as possible. The National Instructions stipulate that the statement should be taken only 'once the victim has recuperated sufficiently', giving an ideal timeframe of 24 to 36 hours after the rape. In practice, the approach in the Western Cape seemed to be to take the statement *immediately*, perhaps validating an underlying attachment to the notion that an 'immediate report' is necessary to found a credible claim. There may, of course, be a good reason for taking a statement speedily, such as when the information is needed to expedite the tracing and charging of a suspect, but the utility of taking a full statement promptly needs to be offset against the implications of dealing with a complainant who may be traumatised, exhausted or inebriated.<sup>442</sup>

One in five of the Western Cape statements was taken between midnight and 6am, when the rape was reported. In only seven cases was there any indication that the statement-taking had been delayed. In two of those cases the victim was too drunk to make a statement. In one, a Sotho-speaking interpreter was required (but not found—so that eventually the complainant's brother interpreted for her). In another, the complainant requested a female police officer to take the statement and had to wait until one was found. She was raped on 13 December and a full statement was taken only on 7 March. A month later she left the country.

The accuracy of her statement is one of the key determinants of a complainant's credibility. Where the complainant and investigating officer do not speak the same language the details are inevitably lost in translation. One Afrikaans-speaking Rape Crisis client reported her concern that the statement she had given in English to a Xhosa-speaking detective may not have been correctly transcribed. A magistrate reiterated this concern, noting that 'some statements don't even make any sense.' Pointing particularly to this kind of situation, where both the complainant and the person taking the statement are not English-speaking, but the statement is recorded in English, the magistrate explained:

*The investigating officer translates the events in poor English into the statement and the complainant, who is not versed in speaking or reading English, signs the statement, trusting that her version of the incident has been accurately translated.*

A number of Rape Crisis clients complained that they had not been given sight of their statements. One ascribed her loss of faith in the police to the fact that she saw that her statement was riddled with spelling errors when it was given to her to sign.

The quality of statements arose as a matter of serious concern in discussions with other role-players in the criminal justice system. One prosecutor complained:

*Statements are taken very poorly. The use of language is shocking. Honestly, it's an embarrassment. The content is very*

*limited. Sometimes the complainants are stressed out, they are obviously crying, they just tell the story and the investigating officer takes the statement down—and they're done.*

Another prosecutor was even more categorical, saying 'I don't think investigating officers know what they're doing. All they seem to do is collect information that is readily available. I don't think any of them use their brains.'

Other cases in which a statement was not taken immediately reflect less of a deferral of the statement-taking as required by the National Instructions, and more of an abdication of responsibility on the part of the police. In two such cases the victim was told that she should go to the hospital the next day and, if the doctor confirmed that she was raped, should come back and make a complaint. Consider the statement by a victim's mother:

At the police station I was interviewed by Inspector S. After the interview Insp S told [my daughter] that she was not raped. She was just a naughty child. He then told me that I could go and I could bath her. At home while bathing her I noticed that the panty was soiled with blood. I washed the panty ... After I have bathed [my daughter] I took her to Dr L for treatment. Dr L informed me that she could not examine [my daughter] without the permission of the police. She then phoned the police. Insp S told the doctor that I should be at the police station the following day. I then brought her and Insp S took us to ... the District Surgeon. She was examined by the doctor and she was given some medication.

The case was closed within three weeks as undetected. A number of reports from Rape Crisis follow a similar tack. Details transcribed from the complainant's statement into the investigation diary are often incomplete and sometimes incorrect. This includes contact details for the complainant and perpetrator, as well as the name of the suspect and where he is believed to live. Detectives confirmed that they seldom revisit

the complainant's statement during the course of their investigation, relying instead on notes made in the investigation diary. Concerns go beyond poor language and incomplete statements. A magistrate expressed concern that some detectives don't know the elements of the offence of 'rape' and therefore attach the term to any act of a sexual nature. Defence attorneys then use this incorrect nomenclature, contained in the complainant's sworn statement, to discredit and confuse her at trial.

#### FOLLOW-UP AND INVESTIGATION

I deliberately did not set out to assess whether an adequate investigation had been conducted on the cases I read. My views on the investigation are therefore necessarily impressionistic. A substantial number of cases contained evidence that a lot of work had been done on them: the dockets contained multiple affidavits and notes of numerous efforts to track down the perpetrator (and sometimes also the complainant), as well as leads followed. It is completely understandable that detectives voice extreme frustration at the fact that these cases are not prosecuted.

Arrests were made in 51 per cent of the Western Cape and 63 per cent of the KZN dockets. Although this appears impressive, detectives repeatedly reminded me that the 'arrest rate' is an indicator used to measure police performance, complaining that they were under pressure to arrest, even when they did not believe the complainant's story. One detective suggested that only two out of ten arrests is in fact warranted. This provides one possible explanation for the fact that very few of the arrest statements contained the full particulars of the suspect. Most importantly, his identity number was generally missing and no fingerprints were taken. This information would have provided some assistance, perhaps, in following up these cases. It was certainly not clear, when looking at the dockets, how a perpetrator who had been given bail and absconded could subsequently be traced. In fact, detectives were quite frank in their assessment that the case was likely to be closed if a perpetrator 'went to the Eastern Cape for a couple of months' or where 'his place is visited 3-4 times' and he was not at home.

In some dockets it was clear that the follow-up had been extremely poor. In one case the detective noted that the reason for not offering the complainant a medico-legal examination was that 'she says she didn't sustain any injuries'. In another case it took four months to get photo

albums to a complainant who was confident that she would be able to identify the perpetrator. The case was closed undetected. In at least one case the follow-up was inappropriately linked to investigating the complainant and her credibility. The complainant's mother protested that detectives had made enquiries in their residential complex about her daughter's character, which was 'very upsetting to the victim'. The complainant in this case was raped by a stranger nowhere near her home. The investigation diary foregrounds the fact that she had recently had a fight with her boyfriend and that she had previously (apparently) tried to commit suicide, a 'fact' that the detective unearthed during his informal investigation into the complainant. There is not a single indication in the docket of any effort made to investigate the identity of the perpetrator (identified by the complainant as a 'security guard').

The Rape Crisis records show that while a substantial number of victims were positive about their experience of reporting to the police, many became angry and disillusioned as the case progressed. The process of bringing someone to justice through the criminal courts is a daunting one, and it should not be surprising that someone who has experienced such a profound assault on their physical and psychological integrity may find the criminal justice process too much to deal with, despite the good work of the police. But it is unacceptable where disillusionment with the system results from police ineptitude. One victim reported, for example, that she was taken by the police to pick up the perpetrator. 'She felt embarrassed when they identified her to bystanders as the rape survivor' and she consequently dropped the case. Another said that she had felt 'comfortable' giving her statement, but 'started to get upset because the police never informed her about their investigation. She always has to call them.' It was noted of a complainant that she had been to two identity parades with no follow up. According to the counselling report,

[t]his made the survivor very upset and angry, and caused her to feel disempowered and not in control. Her experience of the police reminds her of how she felt when she was raped.

In other cases it was obvious that detectives were simply going through the motions. The investigation diary in one case reflected that the

detective had been to the suspect's home, but that the suspect had moved. Six weeks later the detective again visited exactly the same address and noted again, not surprisingly, that the suspect had moved. This desultory approach is reflected in the interaction below, drawn from the investigation diary of a case involving an acquaintance rape in which the victim was also assaulted with a hammer (with injuries confirmed by the medical examination):

17/01/2004:

rape reported and investigating officer visited suspect's house. No one at home.

18/01/2004:

investigating officer visited suspect's house. No one at home.

09/02/2004:

investigating officer visited complainant's house. Not home.

01/04/2004:

investigating officer back from leave.

10/05/2004:

investigating officer visited victim. Not home.

10/06/2004:

docket closed 'undetected'.

It seems from this case that two visits each to the suspect and complainant's homes is sufficient to close the case, even where the suspect is known to the police and the evidence supports the complainant's claim. In another case, the investigating officer, over a period of 16 months, appeared to use every excuse available to ignore the investigation, including:

That the suspect was not at home, the victim did not know where he had moved to, and he was 'therefore untraceable'.

The suspect's address did not exist.

'Complainant was contacted. She doesn't want to go on with the case' (after being instructed to obtain an arrest warrant for the suspect).

'Complainant's address does not exist' (explaining the absence of a withdrawal statement).

Instructed to phone the complainant, the detective wrote: 'She is not interested in this case anymore ... she is working and haven't got time to come and see me'.

Seven months later (and 16 months after the complaint was laid) the detective noted: 'Phoned victim. She confirmed that she is not interested in the case. She solved the matter with the boyfriend'.

Here we have, in one case, all the usual excuses: 'suspect untraceable', 'victim untraceable', and 'victim doesn't want to go on with the case', for 'no reason', because she 'doesn't have time' and has 'reconciled with the perpetrator'. It suggests that, in supervision, only the previous diary entry is read and responded to—otherwise surely this comedy of errors would have been picked up and dealt with by the detective commander.

#### VISITING THE CRIME SCENE

When violent interpersonal crimes are committed, the victim's body becomes a critical source of evidence. The National Instructions on Sexual Offences make this fact explicit, stating:

It is of utmost importance that the member on the scene safeguards the crime scene. Members must take note that in most cases of sexual offences, there are three basic crime scenes, namely the bodies of the victim and the suspect and the place including, where applicable, the vehicle or vessel at or in which the incident took place and where the victim and offender moved to. Important evidence in the case will often be that contained on the person of the victim and at the crime scene.<sup>443</sup>

The National Instructions place responsibility on the first officer attending the rape complaint to ensure that the 'crime scenes' are preserved. The National Instructions also provide detailed instructions on how to deal with 'the victim as evidence', including: avoiding contact by the same police officer with the victim and the suspect before both have been medically examined, dressed in other clothes and the clothes worn during the alleged rape removed for forensic analysis; avoiding contact by the same police officer with the *clothes* of the victim and suspect; packaging exhibits taken from the victim and suspect on different work surfaces; transporting the victim and suspect in different vehicles; and conducting the medical examination of the victim and suspect in different rooms and on different surfaces.

The instructions go on to deal with the medical examination of both the victim and the suspect. The 1999 National Instructions contained no direct instructions on how to deal with the 'second crime scene', that is the physical space in which the crime occurred, while the 2008 National Instructions specify that 'nothing on the crime scene should be touched or moved'.<sup>444</sup> My sense from the dockets is that the physical location at which the crime occurred has been de-emphasised to the point where the only real crime scene is the victim's body, which quite literally comes to embody the validity (or not) of her claim to have been raped. The Western Cape dockets show that in 70 per cent of the cases the police did not visit the crime scene at all, even when complainant statements mentioned weapons, condoms and other physical evidence. Weapons were seized in only two cases. For the rest there is no indication that possible corroborating evidence, mentioned in the complainant's statement, was considered to be crucial in the investigation. And so, the focus reverts to the complainant. In the absence of possible corroborating evidence from the place where she was raped, establishing the validity of her claim depends on the validity of forensic evidence gathered from her body and on her credibility as a witness.

#### FEEDBACK

Given the emphasis placed on communication with the complainant in the National Instructions it was astonishing to find that in 56 per cent of the Western Cape cases there was no indication whatsoever of any



feedback from the investigating officer to the complainant. Furthermore, where there were indications of contact with the complainant, diary notes pointed to inconsistent feedback preceded by months of silence. The excessive length of time between a rape being reported to the police and detectives attempting to make contact with the complainant is extremely problematic, inevitably resulting in high levels of attrition, as complainants move on—physically and emotionally—or as they lose faith in the criminal justice system. While detectives expect complainants to be readily available, and to initiate contact with the police, they are quick to assert that complainants should not expect to be able to contact them at all times. One of the detectives I interviewed was particularly annoyed about complainants who insisted that he be available, saying that:

*We deal with difficult people every day. Some people insist that we go and see them immediately and when you tell them that you are busy they say 'don't tell me that, I want to see you now!'. One woman called my commander and told him I am never available when she needs me. She expects me to jump when she calls. She must wait, but she is totally difficult. I told her I will deal with you later.*

This statement was made in the context of a discussion about the emotional difficulties of investigating sexual offences and was prefaced by a comment from the detective about the importance of leaving work at work and not taking it home. That is clearly very important. The emotional impact of dealing with complainants on a daily basis cannot be overstated and the risk of vicarious trauma to the investigators—as well as the impact this has on the quality of service provided by the criminal justice system—is one that is not adequately dealt with by researchers or by police management.<sup>445</sup> At the same time, the picture that emerges in these dockets, and through the interviews, is of detectives who can choose when they wish to deal with the rape, but complainants who cannot. If it is a good time for him to call, she must be available, even if it is not a good time for her. But when she wants to talk to the detective about her case she must stand in line.

There were cases where detectives provided substantial feedback and support, including taking a complainant, who phoned the detective in an emotional and fearful state late at night, to her aunt's house across town. Rape Crisis clients indicated that police officers had phoned to see how they were doing and provided assistance in obtaining domestic violence protection orders and collecting belongings from the perpetrator's home. The problem is certainly not that there are no 'good cops', but that responses are so wildly inconsistent as to make obtaining service from the police little more than a lottery.

## **Supervision and case management**

### DETECTIVE COMMANDERS

Supervision and oversight are key elements in managing the exercise of discretion by detectives and ensuring consistent service levels. It is therefore heartening that in only five Western Cape cases was there no evidence of interaction between an investigating officer and the detective commander. In 96 per cent of the dockets this communication was present in the investigation diary. But it was shocking to see how little attention detectives paid to that supervision, with instructions being blatantly ignored or side-stepped. My impression was that either senior officers have very little effective control over the actions of detectives, or supervisors are simply going through the motions along with their subordinates. The case described in the introduction to this book, involving a woman who had been raped after accepting a lift home from a woman and her 'father', illustrates this point. Recall the supervising officer's admonition to the detective, after the case had been open for more than a month:

Your investigation or the lack thereof comes down to severe negligence on your part.

This docket must receive the attention it deserves.

Why was no crime kit completed?

Do it NOW!

The same day the detective went to the complainant's house and obtained a withdrawal statement from her. It read:

I have spoken to the investigating officer about the case, but I cannot answer any of his questions. That is, who is the man who raped me, who was sitting at the table [in the shebeen], and also where it happened. I can therefore provide no information to take this investigation forward. I also told my mother this. I therefore feel like I don't want to continue with the matter.

This is a complainant who is effectively expected to investigate her own case. There is no indication in the docket that the investigating officer himself went to the shebeen where the complainant was drinking before being abducted, or that he attempted to identify the suspect or the distinctive car he was driving. Instead, he had taken a red pen and underlined on the complainant's statement that the perpetrator had bought beers for her. His response to his supervisor was to convince the complainant that the case was going nowhere and should therefore be discontinued. On a quick scan of the dockets, this is just another 'victim withdrawal'; another example of victim non-cooperation. A closer reading suggests that it is in fact the system that has failed to function effectively.

Another case, involving a woman who was raped and assaulted by an acquaintance, follows a similar pattern. The detective wrote in his investigation diary shortly after the case was reported:

I do not know if people is still interested in this case because they are [never] at home. Even the victim did not know where the suspect stays.

Three months later the supervising officer wrote:

It's been three months already ... Do whatever it takes to work on this case.

That same day the detective visited the complainant and found her at home, where he obtained the following withdrawal statement:

I did not feel like going on with the case. I feel that what happened happened but I won't live with it, but must go on with my life. That's why I want to forget the case and everything.

Even where there is an apparent link to other cases—and therefore, one would think, perhaps a greater incentive to pursue the matter—this does not appear to provide an incentive for compliance with instructions. In a case where the investigating officer appeared to have done no work for two months, on the basis that ‘I can’t get hold of the victim’, the detective commander wrote:

This is a serious matter. We have a few cases at our unit with the same modus operandi at [the same place]. I believe it might be the same gang. Please try to trace the victim and her boyfriend ...

There was no response to this entry and a week later the case was closed ‘undetected’, with no indication of any further investigation.

Closely linked to supervision is the issue of case management, with cases being archived or misfiled for a length of time. In a case involving a 17-year-old girl raped by two men, the detective noted in the investigation diary:

After this docket were given in for inspection, the docket weren’t given back to me. The docket was found between the closure dockets. Nobody could give me an explanation how the docket got there.

The complainant subsequently withdrew her complaint. In another case, the docket was found, archived, 10 months after the last entry. Again the complainant, when the investigation recommenced, withdrew her complaint.

Although I made no attempt to link cases, two involving the same perpetrator did come to light. There was no cross-reference between these cases, involving different detectives at the same police station, and no indication in the docket that the police had connected the two. Only one of the two cases referenced the suspect’s lengthy record of prior convictions, including two for rape. In the first case the suspect raped an acquaintance in the company of two of his friends. He was given bail on 24 November. The second offence took place on 28 December, when he raped his brother’s girlfriend, over a period of two days, threatening to kill her and his brother. Both rapes were extremely

violent. In the second case an instruction was given to arrest the perpetrator one week after that rape was reported. The detective was on leave until 1 February, so no action was taken. The suspect was eventually arrested on 11 March for the second rape, but a month later the SAPS69, which lists prior convictions, was still outstanding. He was again given bail. On 16 March the first complainant withdrew her complaint because 'I feel that my life is threatened'. Three months later the detective noted of the second case:

I visited the complainant's address. She was not home and I spoke to her daughter. According to her daughter she heard that her mother has gone to hospital, but she doesn't know which one. The complainant has been away from the house for 3 months and they don't know where she is. At this stage the mother is untraceable.

Perhaps if these cases had been linked earlier, both investigations as well as the perpetrator's threats would have been taken more seriously. At the very least, bail in the second case could have been vigorously opposed. The second charge was withdrawn because the complainant's whereabouts were unknown. Given the context of the case that should be worrying.

Basic coordination errors also came to light. In a case involving the abduction of the complainant and more than one rape charge, the detective noted in his investigation diary:

I went to the police station but was informed the suspect has been taken to court already, even though he wasn't charged. At court I'm informed that he's already been released since there was no docket.

The case was withdrawn by the complainant a week later.

Numerous cases showed evidence of lengthy delays because the investigating officer was on 'sick leave', 'stress leave' or 'on course (training)'. Often these delays amounted to months. In a couple of dockets

the handwriting of the investigating officer was almost illegible. It is not surprising given the above findings that a magistrate trenchantly remarked:

*... [t]here doesn't seem to be anyone in charge—or directly responsible for—the investigating officers, ... who can ensure that they are following instructions and leads provided through witness statements.*

## PROSECUTORS

Prosecutors serve a potentially important oversight function. I didn't directly address the role of prosecutors in the management and attrition of rape cases, although it is an important site for future research, but I did review data on the interaction between police and prosecutors, and I explored this relationship with the detectives that were interviewed. Judging by the number of cases dropped from the system by the prosecution, this juncture in the criminal justice process does not appear to be a major attrition point. But such a conclusion does not take into account the role of the prosecution in advising the police, in which case the locus of the decision might not be accurately reflected in statistics. It was certainly true from the cases I looked at that often where prosecutors declined to prosecute the police had already made the decision not to pursue the case. So the caution cuts both ways.

Forty-five per cent of the Western Cape cases showed some involvement by the prosecutor, typically requesting that further statements be taken by the investigating officer. This interaction was generally limited. The fact that prosecutors are seeing the cases is heartening in terms of the potential it holds for further oversight of police decisions and for improving investigations. At the same time, this kind of oversight was not apparent in the dockets. Of the 32 Western Cape dockets in which the case was withdrawn by the public prosecutor, 10 gave no reasons whatsoever. A further six were closed 'after consultation', which also does not provide a reason. Where reasons were given, these tended to be of either an evidentiary or a process nature. Evidentiary issues included a lack of forensic evidence, that the 'complainant would not make a good witness or a truthful one', and that the victim was too young to testify. Process issues predominated however. These included outstanding statements

and that the complainant was not at court or could not be traced. In one case the prosecutor wrote to the investigating officer, saying that the case was being withdrawn because 'to date you have done nothing'. In conversation, prosecutors complained about a lack of follow-up from the police on instructions given, with one saying that 'sometimes they ignore you for three to four weeks ... They don't follow instructions.' He went on to suggest that this was not because police did not have an interest in investigating sexual offences, but rather that '... there is no interest in what they're doing generally. All of them get a salary whether they're at work or not.' Ensuring that police do perform on the instructions of the prosecution will require a mandate that cuts across the current silos of authority, which is yet to be done.

Fifty-five Western Cape cases were closed *nolle prosequi* (decline to prosecute). Typically this decision not to prosecute amounted to the prosecutor giving his imprimatur to a decision already made by the police, usually based on the fact that the complainant or perpetrator could not be traced, or that the complainant had signed a withdrawal statement. It seemed that prosecutors took the investigating officers' word at face value, not questioning, for example, what efforts had been made to secure the complainant or suspect's appearance at court. In one interesting case the prosecutor closed a case on the basis that the complainant and perpetrator had come to an 'agreement'. The complainant, perpetrator and prosecutor all signed the following agreement:

We hereby agree the following:

- 1) that our marriage hereby be annulled.
- 2) that all pending legal cases made by the named parties against each other to be withdrawn forthwith.
- 3) that these cases will not be re-opened or used by the parties for what ever reasons.

It is questionable whether this is an agreement to which the prosecution should be party, given that it is legally impossible and ethically suspect. Marriages cannot simply be annulled by agreement, without recourse to the High Court. And a random prosecutor cannot bind the state to defer from prosecuting criminal conduct. It raises interesting questions about the

power differential between prosecutors and complainants, who have no idea of their legal rights, and so defer to the authority of the prosecutor as an omnipotent representative of the system.

Detectives generally indicated that they had a positive relationship with 'their' prosecutors, although high staff turnover, inexperience and large caseloads were identified by police as problems in some courts. Detectives were also clear that they knew what prosecutors would do with a case. As one detective said:

*You know what to expect. You send the docket to the court and when it comes back you just say "I knew this would happen".*

Only one detective pointed to a case in which he had been unhappy with the prosecutor's decision. In this case the supervising officer was also extremely unhappy, as evidenced by his entry in the investigation diary. The case involved the rape of two children, aged four and five. An eyewitness saw the four-year-old being raped when he followed the victims into an empty church building. He identified the perpetrator, who was also under investigation at the time for murder. After the police picked up the accused they drove to the four-year-old victim's house, with the perpetrator in the vehicle, to obtain statements. When the victim saw the accused she burst into tears. Asked why she was crying, she said that the man in the vehicle was the person who had hurt her. Medical evidence in this case strongly supported the probability that both girls had been sexually assaulted.\* In the investigation diary the prosecutor made much of the fact that the four-year-old said that she had been raped five times even though she 'can't really count'. Three months after the rape, the case was provisionally withdrawn, pending DNA results.

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\* In respect of the four-year-old, the J88 described swelling, bruising and bleeding in the vulva and labia majora, a torn hymen and concluded that the clinical findings and mental state ('Calm initially but crying/screaming when examined. Terrified; unhappy to be examined ++') 'suggests some interference/? penetration'. In respect of the five-year-old, the conclusion is even more direct: 'injuries suggestive of recent penetration'. These injuries included swelling and bleeding in the vaginal area, fresh tears to the hymen, which was 'gaping wide open', a 'vaginal discharge +++ and faecal soiling on her panties'.



The detective commander queried this decision in strong terms:

I am not happy that this case was withdrawn. The accused was in custody and it will be difficult to trace him again. I have not had the time to discuss this matter with [the prosecutor] in detail. Not that it is going to make any difference now. We did discuss the matter [three weeks previously]. I requested her not to withdraw due to the fact that there is an eye witness that links the suspect to the crime and due to the fact that one victim identified the suspect. I will finalise the investigation and when the forensic DNA report is ready, maybe in a year or two, I will discuss the matter with [the prosecutor] to place it back on the court roll.

When the DNA results came back they were inconclusive. The case was therefore never reinstated. The detective involved told me about his unhappiness with this case when I interviewed him at the police station. It was fresh in his mind, since shortly before our interview he had seen the perpetrator in the community service centre of the police station, where he was being charged with the rape of another minor.

## Corruption

The dockets contained no record of corrupt activities—not surprisingly. However, the perception that police are corrupt and the reality that some are, cannot be ignored in any discussion of systemic problems. In fact, when I first reported some of the results from these studies to senior police leadership, the immediate question I was asked was whether there were any indications of fraudulent withdrawal statements in the dockets. In other words, were there indications that detectives had drafted withdrawal statements without the knowledge of the complainant? The answer given then and now is that it would be impossible to establish whether there was fraud without recourse to the complainants. It is, however, not inconceivable that an investigating officer could draft a withdrawal statement on the basis of which he could conveniently close a case with which he did not wish to proceed. I understood the concern

about fraudulent withdrawals better when I read an article in *The Star* newspaper some months later.<sup>446</sup> Since then I have heard numerous anecdotal reports along the same lines. The article reported that a police officer was given a suspended five-year sentence on a charge of extortion after accepting R4 000 from the accused in a rape case that she was investigating. In exchange she arranged for the matter to be withdrawn. She did this by writing an affidavit, in the complainant's name, to the effect that 'At this point I feel I need to withdraw the charges. It may be stupid but I am at peace and need to move on with my life ... The case going to court and seeing my ex-boyfriend in court is traumatic enough'. The only way to get to the bottom of this practice is if every complainant whose case is closed demands reasons from the police—and queries those vigorously when they don't make sense.

Rape Crisis records gave indications of other types of corrupt activity, some obviously so, others possibly only perceived to be corruption. The potential for corruption starts with laying a complaint. Victims claimed that they were harassed into making statements for the Occurrence Book and signing that they did not wish to lay a formal complaint. The Occurrence Book is kept in the charge office of the police station to record reports of crime where a case is not opened. Reports of theft made solely for purposes of satisfying insurance requirements are, for example, recorded only in the Occurrence Book. One detective asked a complainant, the victim of a gang rape, whether he should not just '*skop daai twee dik en los die saak?*' ('give the suspects a good beating and forget about the case?'). When the victim insisted on laying a complaint he told her '*ek klap jou sommer in jou bek*' ('I'll smack you across the mouth' is a slightly less crass approximation). An obvious example of corruption at this early stage includes the following:

The policewoman who took the statement said it could not have happened at the address reported as this was a policeman's house. The policewoman went further even to change the address reported. The survivor could also identify the man who raped her, but the policewoman refused to accept this.

Another victim claimed that after she and a friend were raped they came across a police car and told the police officers what had happened. She also gave them her contact details. The next morning she received a call from the perpetrator—a stranger. She felt sure that he had gotten her details from the police. Yet another victim was told by the officer to whom she reported being raped that ‘he wanted to date her and would come to her house later to sleep with her.’

A lack of investigative zeal can easily come to be seen as proof of corruption: nothing happened in the case because the detective was a ‘friend of the perpetrator’. This line is repeated a number of times in the Rape Crisis records. For a victim it explains why the police refused to take her complaint, didn’t arrest a suspect or oppose bail, failed to investigate the case, and lost the case file. At times allegations of corruption may be true. At other times it might be easier for victims to ascribe a lack of progress to such ‘friendships’ than to accept that they are just another victim and that the police don’t care.

## Stereotypes

The cases described in this book provide substantial support for the contention that the police do draw on stereotypes in dealing with rape complaints and in exercising their discretion. These pertain to who the complainant is, who the perpetrator is (in one case the arresting officer described the suspect’s demeanour as ‘*Goed en verstandelike persoon. Jy kon sien hy is ‘n gesinsman*’[‘Good and responsible person. You could see he is a family man’]), and the nature and circumstances of the offence. At the same time, the cases show that there are other, more prosaic reasons why cases are closed and an analysis that focuses purely on the stereotypes reflected in these cases would miss a big part of the story. Some examples of stereotyping are so egregious that they beggar belief. For example, the 16-year-old complainant was raped over the course of the night by three men, one of whom was known to her by sight. Two of the men had accosted her on the way home and dragged her to a deserted shack. One of the men had a gun and told her that if she didn’t cooperate he would fire it into her vagina. Another threatened to throttle her with his belt if she didn’t stop screaming. Both men raped her. The third man joined them

during the night and also raped her. In the morning they told her that they were going to take her to another suburb so that their friends could 'also have a piece'. As they started walking, she saw someone she knew on the street, called to them, and managed to run away. The medical examination supported the claim of a recent rape.\* The docket contained a brief description of the crime, the name and details of the known suspect, and details of a very cursory investigation. Right at the top of the investigation diary the detective had made a note:

Suspects were apparently drunk. PROBABLE LUST AND SPUR OF THE MOMENT CRIME.

The case was closed 'undetected' two months after it was reported. A young girl out late, drunk men, and an irresistible impulse to have sex. The stereotypes are familiar, but at the same time disorienting. If this is a rape that can be so easily dismissed, what does it say about our social conceptions of 'real rape' in the South African context? Are we—and the police in particular—so inured to violence, and especially brutal manifestations of gender-based violence, that the abduction and gang rape, at gunpoint, of a 16-year-old can be so easily dismissed? It seems that perhaps we are.

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\* Finding: 'Labia majora mildly swollen. Labia minora: erythematous (transl: red). Discharge: seminal fluid. Bruising of chin, periorbital haematoma (transl: 'black eyes'), mild jaw tenderness. Conclusion: In keeping with assault and evidence of sexual intercourse.'

## CHAPTER 9

# Taking Responsibility/Appportioning Blame: Recalcitrant Victims & Refractory Systems

The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.

*Chief Justice Arthur Chaskalson S v Makwanyane 1995 (3) SA 391 (CC) at 443H*

It is not hard to see why attrition has drawn particular attention in the criminal law context of sexual offences. The literature on attrition elucidates two key arguments made by rape activists about the criminal justice system. Firstly, that the system treats rape victims particularly badly, leading to 'secondary victimisation' and further trauma. Secondly, that the processing decisions made by criminal justice actors are so thoroughly infused with gendered stereotypes that only a very small number of cases are treated as serious offences. Attrition studies have tended to support, or at least to accept, the basic proposition that this 'winnowing' process happens at key decision points and results largely from the stereotypical adherence to rape myths by criminal justice actors. They argue that these biases, intersecting with administrative imperatives and evidentiary concerns, result in a disproportionate number of cases that merit redress being dismissed or withdrawn. On this account, the decisions that criminal justice actors make at specific moments in the process derive from conscious and unconscious biases about what constitutes a deserving victim and a valid claim to have been raped. Because of these processes of stereotyping and disengagement, a majority of rape cases inevitably do not make it through the criminal justice process, despite the passage of new rape laws and political pronouncements condemning sexual violence and promising recourse. Judith Herman

goes as far as to argue that '[h]igh attrition rates reflect systemic resistance to enforcement of [rape] laws'.<sup>447</sup> After two decades in which most Anglo-American jurisdictions, including South Africa, have passed far-reaching reforms to their rape laws, the juxtaposition of progressive legislation and its intended effects against apparently increasing levels of violence against women and declining prosecutions is particularly stark.

The view of actors working in the system is markedly different. They complain about the prevalence of false rape reports and place the responsibility for attrition, largely resulting from case withdrawals but also from a general lack of 'victim cooperation', on the shoulders of complainants. Just as the explanation of 'stereotyping' dominates one side of the argument, the assertion of 'victim non-cooperation' is the favoured explanation on the other side.<sup>448</sup> The responsibility attributed to complainants goes beyond undermining their own cases: on some accounts they must take responsibility for also undermining the criminal justice system's ability to respond effectively to violence against women. It is argued that cases are lost as a result of 'complainant apathy and that these complainants should 'see the big picture, and participate out of a sense of civic duty'.<sup>449</sup> If complainants would only be more co-operative, so the argument goes, more cases would be prosecuted and conviction rates would not look so dire.

There is some truth in both positions. Time and again scholars make the point that who obtains redress in the criminal justice system is more often a normative than a legal question. The fact that ostensibly objective 'legal' decisions are infused with (and, indeed, create) social meaning is acknowledged by all but the most die-hard legal positivists. Stereotypes are certainly to be found in this book. But we also see how they are mediated through social and institutional contexts that may very well differ according to the prevailing social norms around sex and sexuality, as well as the particularities of criminal justice institutions and capacity. In this book we get a glimpse into what rape attrition looks like in a post-conflict transitional society such as South Africa, which has undergone enormous social, political and institutional shifts during its transition to democracy. If we focus on attrition as a process of engagement and disengagement, rather than on discrete attrition points, we see more

clearly the pernicious nexus between police capacity to adequately investigate rape cases and the responsibilisation of victims within the criminal justice system.

### Refractory systems?

Since beginning its transition to democracy in the early 1990s, South Africa has faced the daunting tasks of ensuring equal access to resources—including justice—that had previously been reserved largely for the benefit of the minority white population. One of the key institutions requiring urgent transformation was the highly militarised and deeply politicised South African Police force. Like other countries in transition, the inwardly focused change process weakened existing systems and, for a period, destabilised most state institutions. In the police service, an organisation that entered the transition loathed and mistrusted by the majority of the population, this institutional disruption was particularly pronounced. Like many other countries in transition, this period also went hand in hand with an increase in crime and violence.<sup>450</sup> Among the most visible and troubling manifestations of this social disruption has been an increase in sexual violence perpetrated against women and children, the shock absorbers of South Africa's battle with poverty and persistent inequality.

It is now well established that the *political* imperative to transform South Africa's police, and to ensure democratic accountability, took precedence over more mundane assessments of their capacity to police crime. This is understandable given the immensity of the reform programme and the assumption that the police would be no less effective in curbing crime than they had been in the past.<sup>451</sup> They had, after all, been brutally effective in policing and enforcing apartheid laws, as well as in protecting the interests of white citizens. For women's rights activists engaged in this reforms process, the emphasis was on sensitivity training for the police and other criminal justice actors, within a broader human rights framework, so that police could engage more sensitively with the people that they were now called upon to serve. In particular, the focus was on the police as entry point to the criminal justice system. They were taught about rape myths, rape trauma

syndrome, cycles of violence, and schooled in the appropriate handling of rape victims when they reported. This was further supported by the provision of infrastructural support in the form of private trauma rooms at police stations for the taking of victim statements and integrated victim service initiatives like Thuthuzela Care Centres. At this point in time, the police really can reel off the 10 biggest rape myths. They may still subscribe to many of them, but they know better than to blatantly discriminate on that basis.<sup>452</sup> This attitudinal shift is by no means uniform—the experiences of some of the Rape Crisis clients who received extremely poor service makes that abundantly clear. Nonetheless, the fact that the majority of rape complainants were satisfied with their initial interaction with the police makes sense given the amount of energy that has been put into improving service at the reporting stage.

While stereotyping of victims at the reporting stage has been addressed to some extent (I have no doubt that this is a problem that requires ongoing intervention), what is absent from the police response is the ability and willingness to effectively *investigate* rape cases. Where police lack both the time and skills to do effective investigations, the emphasis on complainant ‘cooperation’ becomes particularly pronounced. The police are now less concerned with who reports (the ‘real victim’), or even with the circumstances of the offence (whether it is a ‘real rape’), than they are with the expectation that the victim comports herself as a responsible and engaged ‘complainant’ throughout the process. It is therefore critical to distinguish between the initial interaction—where the victim comes to the police station traumatised and looking for validation and sympathy—and the later execution of an efficient and professional investigation. Most complaints about the police relate to how victims are treated during the course of the investigation, rather than at the reporting stage, with a lack of enthusiasm for the investigation, little or no access to information, and no support from the investigating officer being among the dominant concerns. While the police are initially sympathetic, from both the victim’s perspective and on the evidence in these pages, they seem to lose interest in the case as it progresses.

A prosecutor I spoke to commented that: ‘Good old-fashioned policing doesn’t exist ... Police do not do investigations.’ There is more than a kernel of truth in this statement. Consider, for example, the paperwork



contained in the dockets. While 128 of the 132 Western Cape dockets contained a victim statement and 105 contained a medical report, only 65 contained a statement from the person to whom the rape was initially reported, the so-called 'first witness'. Obtaining the 'first witness' statement is an integral aspect of any rape investigation and essential in corroborating the victim's complaint. It is unlikely that a rape case would be prosecuted without one. Furthermore, detectives visited the crime scene in less than a third of cases, despite references in complainant statements to condoms, weapons and other physical evidence which could have further corroborated the complainant's story. One can only conclude that there was never the serious intention of preparing these dockets for trial. Where arrests were made, information on the suspect was scanty. Addresses weren't recorded, nor were identity numbers, or fingerprints. It was impossible to tell how these suspects would ever be traced if they jumped bail, as many did. This is particularly problematic when viewed in light of the fact that a substantial number of suspects had prior criminal charges against them, and that many of the rapes were extremely violent, involving weapons and serious physical injury to the victim. There was very little information about, for example, gang affiliation, gun ownership, or other indicators of whether or not the accused had a propensity towards further violence. The empathy and responsiveness shown at the reporting stage of the process also seems to break down once the investigation is underway. In well over half of the Western Cape cases there was absolutely no indication of feedback from the investigating officer to the complainant.

The police expect case withdrawals. One enterprising detective developed a template withdrawal statement on which complainants were asked to select their reason for withdrawing the matter from the options: 'The accused and I sorted the matter out'; 'I would like to withdraw the case for personal reasons'; and 'The person has compensated me for the damages caused'. Here we have, neatly bureaucratised, the formalisation of stereotypes. Victim withdrawal requires no further explanation. The range of choices has been laid out for her. The cases described in this book reflect a worrying intersection between the personal concerns of complainants, many arising out of structural conditions over which they have little control, and systemic issues, such as poor investigations and

inadequate supervision. Police necessarily prioritise the allocation of resources and will consider those cases in which complainants are actively interested to be a better investment of time and energy than those where complainants appear disinterested. After all, as Reiner points out, in general '[p]olice officers are concerned to get from here to tomorrow (or the next hour) safely and with the least amount of paperwork'.<sup>453</sup> But one must be careful not to assume a system in which police and prosecutors make rational decisions untainted by institutional malaise or corruption and with meaningful supervision and accountability. What I saw was detectives who were left to continue with their cases as they saw best, which often meant doing very little for a very long time.

Why was police dereliction not picked up when the dockets were reviewed by the detective commander? Often it was and the admonitions touched on exactly the problems identified in this book:

Why have you not obtained reports from the witnesses?

Why have you not contacted the complainant?

Why have you not arrested the suspect?

Why was no crime kit completed?

And the conclusion:

Your investigation or lack thereof comes down to severe negligence on your part.

It is in the detectives' responses to these reprimands that the breakdown in internal authority and oversight becomes most apparent. In some cases the detective follows up immediately on an instruction by the detective commander to 'work on this case' by obtaining a withdrawal statement from the complainant. To dispose of such a case requires no more than impressing upon the victim that she has been of no assistance in investigating the matter, that the police cannot be expected to take the case any further, and that she should therefore rather withdraw the complaint than continue to waste police resources. In this way, a case that should have been closed as undetected—and may have raised questions about the quality of the investigation—can be safely filed away

as 'withdrawn complainant', with responsibility attributed squarely to the complainant's unwillingness to continue with the matter. In a number of other cases, in response to similar instructions to investigate the case, the detective reports that the complainant has become 'untraceable' or is 'not interested', a discretionary sleight of hand that again blurs the locus of the decision, and in which commanders, who do not seem to read beyond the last entry in the docket, are also complicit. Even blatantly contradictory statements in the investigation diary, such as a statement that the detective has visited the complainant's home, followed some months later by a statement that the complainant's address does not exist, seem to pass without comment. A prosecutor provided the following insight into this institutional malaise:

*What could be more demotivating than your boss expecting you to do a job and not helping you to do it? These chaps don't get the managerial and logistical support that they need. I believe that they are committed, but enthusiasm to clear the townships or the city of rape is lacking. The police don't think it's possible. It's just another day with more rape cases.*

Gareth Newham argues that the achievement of political accountability to the democratic government is what makes police reform in South Africa a success story in comparative terms, but at the same time '... the dramatic changes in the police service brought about by democracy have weakened previous systems of police officer control, creating the space for other types of abuses to flourish.'<sup>454</sup> The result is that individual police officers, working at station level, are not consistently held to account for their failure to provide effective services—whether through corruption, malaise or incompetence. This lack of internal oversight becomes particularly acute in a context where little attention has been given to developing basic policing skills. While successive strategic plans have reflected on the need for improved training and resource allocation, little mention has been made of strengthening systems or holding police officers accountable for the quality of their investigations.<sup>455</sup>

The emphasis that I have placed on police investigations doesn't mean that attitudes don't matter, or that complainants are not vetted. But in

my view the combination of social context training to shift attitudes at the reporting stage, and a skills deficit at the investigation stage, have worked together to materially shift the terms of engagement between victims approaching the criminal justice system and those who work in it.

### Victim responsibility

The view that most rape complainants are likely to withdraw their complaints, or are unwilling to cooperate in bringing the perpetrator to justice, necessarily influences how complainants are vetted and whether they are seen as having a valid claim on police resources. There are ample examples of stereotypical attitudes about victims. Sex workers, women living with mental disabilities, and adolescents get a particularly bad rap, but no one is immune. The possibility raised, however improbable, that a complainant is a sex worker immediately results in a flurry of further questions about the credibility of her statement. A woman suffering from schizophrenia is told that she is a 'naughty child', making up rape stories of sexual assault, and sent home by the police.<sup>456</sup> Mmatshilo Motsei points out, in the context of a high profile South African rape case, that it is difficult to know how a 'good victim' should comport herself:

If she takes a shower, she is told she destroyed essential evidence. If she doesn't, she is not a typical rape victim and may be accused of lying ... a female rape victim who doesn't fight back is perceived as a willing participant. If she fights back, however, she runs the risk of injury or death. If she chooses not to speak out, she will die inside. If she speaks out, she is a devil and deserves to burn in hell. Either way there is a possibility of death.<sup>457</sup>

But it is not at the point of reporting that 'credibility' really bites. I have suggested above that interventions aimed at breaking down stereotypical perceptions of 'real rape' and 'real victims' have been reasonably successful in countering these stereotypes at the reporting stage. It is at the investigation stage that the victim's credibility, as a *complainant*, comes to play a central role in determining police responses. Just as attrition is a process which cannot be neatly carved up into discrete 'attrition points',

so victim credibility and the decision by the police to accept her claim as valid is not simply based on a checklist of 'real rape' or 'real victim' variables mentally ticked off at a specific moment in time. Rather, it is based on an ongoing (and rigorous) assessment of the complainant as she progresses through the system. The police are not the 'gateway' to the criminal justice system, an image which suggests that one is either in or out, entry permitted or denied. Instead, the investigation stage is better viewed as a gantlet. It is possible to pass through, but the expectations are ongoing and relentless, and few will come out on the other side unscathed. The expectation that police have of complainants is that they must continuously prove their commitment to the process, by being a 'good complainant'. Credibility demands made on victims in South Africa seem to have less to do with the nature of the offence, or even that they necessarily comport themselves appropriately as rape victims at the time of reporting, and more to do with proving that they are serious about the case once entry has been granted. They do this by taking responsibility. It is an ongoing demand of criminal justice actors that victims—or those who purport to have been victimised—continue to prove their worthiness, constantly reiterating their credibility, by showing their commitment to the process, throughout the investigation. Complainants are required to be constantly available, always consistent, and to follow up regularly with the investigating officer. Perhaps most astonishing is the clear expectation that complainants will actively investigate their own cases. We see this in the investigation diaries, in the delivery of 'point out notes', and in the withdrawal by complainants of cases with the apologetic explanation that they have been unable to adequately assist the detective. More than that, responsibility is ascribed to them for incorrect and incomplete contact details in the dockets, and for failing to 'cooperate' in other ways. Even a six-year-old victim, whose mother is too drunk to get her to court, is labelled as 'uncooperative', and her victimisation dismissed.<sup>458</sup>

If the police are responding to the constant demand that they take victims seriously, then they feel that victims need to reciprocate and prove that they're worth the effort. One detective I interviewed was adamant on this point: if a complainant comes looking for him 'they must show me that they are interested (because) I'm not going to waste my time'. Of course there is an effective bias in this response: if the

decision to prioritise investigations is based on the enthusiasm that the complainant brings to the investigation, then complainants who are better resourced and more empowered to deal with the system will inevitably receive better service. Complainants who don't make this effort are 'not interested' and not worthy of police resources. This attitude seems to arise in relative isolation to the objective seriousness of a case. The levels of injury we see in these cases is staggering, suggesting that in South Africa at least, high levels of violence and weapon use are no longer useful in thinking about what constitutes 'real rape'. There is simply too much violence perpetrated on women's bodies confronting the criminal justice system every day for all but the most egregious to really register. There are certainly echoes of old stereotypes in police expectations. It can be fairly argued that gendered stereotypes are so intimately woven into police and criminal justice conceptions of sexual violence that they pervade decision-making regardless of the overt orientation of the officers concerned. How we define what constitutes an act of rape, under what circumstances we hold the perpetrators of such acts liable, what evidence we admit and how we evaluate it are all exercises laden with deeply entrenched values around sex and sexuality. But police responses seem to go less to the question of whether a complainant was raped, or even whether she was raped by a stranger/acquaintance, in a public/private place etc., than to whether *she* takes that rape seriously enough to warrant the police doing anything about it. The levels of injury involved in many of these cases suggest that, while police accept claims of rape victimisation as valid, they require more.<sup>459</sup>

Offset against the responsibilisation of victims, and no doubt associated with the extent of demands made on them, is the police's own official conception of their role in policing rape. This is encapsulated in the description of rape, repeated in every Annual Report, as a crime that is, 'social or domestic in nature and (occurs) in social environments (e.g. the privacy of residences) which are usually outside the reach of conventional policing ... [and] usually occur between people knowing each other, e.g. friends, acquaintances and family members'.<sup>460</sup> In its very conceptualisation of rape the police treat it as an offence that is inherently resistant to criminal justice intervention.

## Recalcitrant victims?

The withdrawal of their complaints by victims is regularly cited, both locally and internationally, as a problem, inhibiting effective criminal justice responses to violent crimes perpetrated against women.<sup>461</sup> The most problematic complainants are those whose victimisation is acknowledged, for whom the system seeks justice, but who refuse to cooperate with the police in that pursuit. At the extreme it is posited that the only reason why a complainant would eschew the redress offered by the criminal justice process is because she was not seriously affected by the rape—or was not raped at all.

All studies suggest that women living with mental disabilities are least likely to be believed, despite their obvious vulnerability to sexual violation. We see in these pages that the criminal justice system is hopelessly unequipped to deal with such victims. Also disturbing is the prevalence of statutory rape, in the cases categorised as 'false' and throughout the other cases. The notion that girls who are barely entering puberty are not only freely choosing to be sexually active with substantially older men but also, like conniving Lolitas, lure such men into sexual relationships, is extremely problematic. It is clear that such views have come to be widely shared in the criminal justice system. The perception seems to be that poor, black, township girls have such levels of sexual maturity from such an early age that they should effectively be treated as adults. The cases suggest that parents are concerned about the sexual activities of their teenage daughters and are seeking out interventions. Furthermore, non-enforcement of statutory rape laws is at odds with public and legislative debates about the age of consent, broader concerns like HIV prevention, and the provision of a range of services, including access to contraception and information and services relating to the termination of pregnancies.<sup>462</sup> The decisions of law enforcement agencies suggest a belief that statutory rape laws are only intended for the protection of the 'good girls' and not the 'bad' ones (who take drugs, hang out with gangsters, drink and have multiple sexual partners).

The question arises as to why statutory rape charges are not filed. The use of the statutory rape law would not only reflect a social and legal value, as a charge in its own right, but would provide a pragmatic

alternative charge in cases where consent is raised as a defence by a perpetrator, who otherwise acknowledges having sex with a girl. This would require a normative shift in how police view the opportunistic access of older men to young girls' bodies, even in those cases (and perhaps particularly in those cases) where under-aged girls have engaged in conduct that has further increased their vulnerability. Enforcement of the statutory rape laws would require an institutional acceptance and willingness to work with the fact that many of the victims they encounter are 'bad girls'.

The agency of many of the adult complainants in this book cannot be discounted. They are also decision-makers, exercising their own discretion, with personal and social contexts that influence how they engage with the criminal justice system. The cases discussed here support the view that case withdrawals are often made on the basis of personal reasons, as is the decision to report. If a complainant genuinely does not want to continue with a prosecution there is little incentive for detectives to encourage, let alone force, her to do so. There are simply too many cases landing on their desks every day. Moreover, such complainants are likely to be uncooperative as witnesses and, given their ambivalence, open to attacks on their credibility by the defence. At the same time, victims come to the criminal justice system wounded, with conflicting (and often conflicted) motivations, different experiences of victimisation, varying support structures and often with a limited capacity to cope with the rigors of the process. From those who already have limited resources, the system asks for more. Victims must remain engaged despite the apathy, or even active discouragement, of those tasked with investigation, and despite the indeterminacy of both process and outcome.

Sometimes victims decide that despite the best efforts of the police they can no longer continue with the case. Others may feel, and this is reflected in a number of the withdrawal statements, that they have achieved what they sought from making a complaint—validation, a sense of agency, even a semblance of security—and choose to withdraw short of going to court. Again, such decisions are made in a context—hers, and the one into which she has entered by going to the police. One cannot begin to understand women's engagement with the criminal justice system in South Africa without recognising the relationship



between sexual violence and the social fabric of daily life. As Naila Kabeer reminds us, 'the exercise of choice requires access to social and material resources'.<sup>463</sup> For most of the complainants in this study the context is one of grinding poverty. Their class status dictates their risk of victimisation, the resources that they can call on to cope with the effects thereof, and their ability to make demands on the criminal justice system. Only four of the complainants in this study came from one of the more affluent areas. The others all came from areas marked by poverty, unemployment and crime. This not only directly affects the choices they are able to make, but also adds the burden of surviving the everyday struggle to access basic resources. This reality creates structural conditions that leave victims of intimate partner violence, in particular, with little choice but to return to abusive relationships. Only one in four of the Western Cape complainants was employed, and those complainants still lead economically fragile lives, largely dependent on other familial sources of income, social grants and their community for social support. A number of withdrawal statements refer to not only the victim's own financial dependence on the perpetrator, but that of her children. In this context the fact that 42 per cent of the Western Cape complainants who withdrew their cases 'reconciled' with the perpetrator or 'sorted out the matter between the families' should not be surprising. Many women are forced to prioritise food, water and shelter for themselves and their children over justice and even over their own physical integrity. Community members have little faith in the ability of the police to respond to violence. A University of Stellenbosch study summarises the attitude in Ocean View as follows:

All focus groups have mentioned that they do not feel safe in Ocean View. Gangsterism and drug trafficking is rife and concentrated predominantly among the youth. Violent crimes such as rape, murder, assault and domestic violence prevail ... There is a lack of trust and confidence in public servants (police, health care workers and social workers).<sup>464</sup>

In a context of extreme poverty and pervasive violence, calling on the criminal justice system is not necessarily the most obvious response to

criminal victimisation. The withdrawal of those who do make this decision when a better option presents itself, or when engagement with the system proves to have little utility or comes to feel threatening, should not be surprising.

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Attrition is a necessary feature of any criminal justice process. Our conception of criminal justice decision-making as producing just outcomes requires that, as far as possible, those who are guilty are tried and convicted, and those who are innocent exonerated. The process must allow for this to happen. For the most part we accept the possibility that in setting an evidentiary bar that protects the innocent, we may sometimes also allow those who have committed crimes to go unpunished. We want a system that is sufficiently nuanced to ensure that weak cases are filtered out, so that only suspects against whom the state has built a sufficiently strong case are required to answer for their conduct in court and face the possibility of criminal sanction. The social and institutional contexts in which sexual victimisation occurs, is reported, investigated, and withdrawn, or otherwise disposed of, create their own imperatives. These contexts and experiences necessarily overlap. Very often the disposition of a case seems to evidence a progressive disengagement from the complaint on the part of both the victim and investigating officer. It becomes difficult under such circumstances to discern who finally ‘made the decision’ to close the case, or even when the decision was actually made. Like a bad relationship, these cases tend to drift along with neither party clearly articulating their expectations or disenchantment, both disappointed in the other, until they finally fizzle out or are brought to a head by some other intervention, such as that of a supervising officer. But, like a bad relationship, blame is inevitably apportioned. A disposition category is written on a docket cover, reflecting who took the decision, who is responsible, and who is publicly held to account. The effect on women’s access to justice—and, perhaps more importantly, to security—is staggering. Reviewing over a thousand pages of source data, I am struck again and again by the extreme, mindless brutality of so many of the cases, of which I could only provide narrow snapshots in these pages. I find myself time and again shocked that the

men who perpetrated these crimes are free to commit further acts of violence, and that complainants who, like Tandazwa Mpofu, every day seek recourse through the criminal justice system are denied justice and left vulnerable.

## ANNEXURE 1

# Examining Rape Cases

### Negotiating access to data

Police dockets are not public documents. They contain sensitive personal information and, where there had not been a decision not to prosecute or have a court hearing, are treated as 'open' dockets that might be subject to further investigation at a future time. The first step in conducting this research was therefore developing a partnership with the South African Police Service (SAPS), on the basis of which dockets would be accessed. This proved to be a difficult and time-consuming exercise. In early 2005 I sought permission from the offices of the SAPS Legal Department in the Western Cape to access dockets that had been withdrawn at station level. Four months later permission was granted to access dockets that had resulted in a finding of guilty or not guilty. Access was specifically denied to 'case withdrawn' dockets on the basis that 'the possibility exists that the withdrawn cases may be re-opened at a later stage as a result of new evidence which could come to light'.<sup>465</sup> Efforts to access information through the National Prosecuting Authority (NPA) were similarly stymied, with consent initially being given and then withdrawn one week prior to starting the review.<sup>466</sup>

In July 2006 my direct appeal to the Western Cape Provincial Commissioner of Police resulted in permission being granted, subject to a number of restrictions.<sup>467</sup> These included that no information may be divulged regarding the identity of the victim, witnesses, perpetrators, suspects or police officials mentioned in the dockets; no attempt may be made to contact any victim, witness, perpetrator or suspect mentioned in the dockets; and no part of the docket may be removed, altered or photocopied.

Once permission had been granted, the SAPS were extremely helpful in procuring the dockets and making staff and facilities available for the study. The SAPS were also very supportive of the second study, for

which fieldwork was conducted in 2011. That study is ongoing, with the analysis of rape cases constituting a slice of a much larger study on the interaction between the criminal justice system and traditional authorities.

Access to the Rape Crisis client database was negotiated with the Director of the Rape Crisis Cape Town Trust, a remarkable organisation which counsels over 5 000 rape survivors every year. The Rape Crisis database contains data collected by counsellors and court support staff. Records for the period 1998-2003 had been entered into the database at the time of the study. Only responses to the question of whether the rape was reported to the police and related comments were provided to me, totalling 591 records. No identifying information was forwarded to me.

Findings from the study were discussed with key informants at various stages in the research process and their input incorporated. These included members of the National Prosecuting Authority and the South African Police Service, as well as a reference group comprising academics, legal practitioners and staff of non-governmental organisations working with rape survivors.

## **Narrowing down the investigation**

### RESEARCH PERIOD

The Western Cape docket analysis focused on all rape dockets opened but not prosecuted at four Cape Town police stations during 2004 and 2005.<sup>468</sup> This period was selected, after permission was given to access dockets in mid-2006, because it was the most recent period during which one could reasonably expect all cases to have been finalised, whether in court or under a pre-court disposition category. The KZN study similarly looked at all rape dockets opened but not prosecuted between April 2008 and March 2009. Although more timeframes could have been added, restricting the studies to these periods made sense given the largely qualitative orientation of this study, the time-consuming nature of docket analysis, and the fact that I am not aiming to produce statistically significant or generalisable results. An obvious limitation is that I cannot pick up shifts in policing practice that might have happened over time. No significant policy or management shifts were made in the period preceding the Western Cape data collection, but it would have been

interesting to see whether any changes were discernible in the KZN study following the passage of new sexual offences laws in late 2007.

#### DATA COLLECTION

Data was collected during September and October 2006 and October and November 2011. A data collection template was used to collect information about the context and nature of the offence, as well as the management of the cases. To obtain this information meant painstakingly reading and recording all data contained in the docket, including the victim and witness statements, the report of the officer receiving the initial complaint, the medical report (J88), statements made by the accused at the time of arrest, records of previous convictions (SAPS69) and the investigation diary. The template was structured on the basis of a police rape docket in order to maximise efficiency (and minimise frustration) by pre-empting categories of data that would be found in the docket and at the same time ensuring that the absence of data, which should be in the docket, would be noted. It was piloted on five cases and revised to make it slightly more 'user-friendly', as well as to accommodate and reflect the sequence in which information was held in the docket. Twenty-five dockets were re-analysed by a second reader to ensure inter-reader reliability in the reading and entry of data. This means, in effect, that one out of four dockets was independently checked.

#### COLLECTING RAPE STORIES

My colleague, Diane Jeffthas, and I did all the data collection for the Western Cape study.<sup>469</sup> We had both worked extensively on rape and domestic violence as researchers and activists. We had also worked in deeply impoverished and violence-prone communities and with victims of violence. But we were not prepared for how difficult this process was. Reading traumatic material is never easy. Police rape dockets contain intimate information, the stories of intensely private violations forced into a public space as victims seek security and some recognition of the wrong that has been done to them. Injuries are accounted for blow by blow. Vulnerability—gendered, sexed, racialised and compounded by poverty and inequality—infuses these stories. Women are raped going to work. Girls are raped going to school. They wake up in their homes to

find men in their rooms, sent to punish them by a spurned lover. Children are raped by cousins, uncles and fathers. From babies to grandmothers, the dockets recount unspeakable horrors perpetrated on women's bodies. They are real stories, about real women, who have lived through these experiences of violence and objectification. We read these stories for eight hours a day over a period of eight weeks. They are unimaginably bleak. They capture a moment of deep despair. There are no notes documenting healing, love or support. The only glimpse of resilience in many of the cases is the fact of still being alive after being left for dead. Being qualitatively oriented, our analysis had to engage with the texture of the stories contained in the dockets. With larger quantitative studies, while still exposed to these traumatic narratives, one invariably retreats into scanning for data and 'ticking boxes' in a way that (somewhat) distances you from the material. Parenzee et al write about this in the context of domestic violence research:

As we gathered data from case files, we felt an affinity with the realities of court officials working with domestic violence cases. Like the officials we began to develop coping mechanisms, for example focusing on completing the research templates in a routine way as it made the information easier to manage emotionally. We started to look forward to straightforward and simple cases, and focused on how to classify and categorise complainants' experiences of domestic violence. As we attempted to document the way in which clerks and magistrates distil and flatten complainants' stories through the routine completion of forms, we too began to mirror this distortion in the research process by transferring the information onto templates. As researchers, not only did we filter women's stories—'he smashed my head against the wall, kicked me as I lay on the ground and threw a chair at me' becoming a tick in the 'physical violence' box—but we also developed an 'abstract applicant', a sense of the 'typical story'. There was a sense of relief when a file contained information that was easy and quick to slot into the information boxes on our forms and relatively simple to decipher.<sup>470</sup>

And, because we were interested in those cases that were not prosecuted, our studies dealt with only those cases in which it seemed that there was no recourse for victims. There were no straightforward cases or simple files. There was no justice and sometimes patently no security. Secondary victimisation was writ large across the dockets. But it was in the cases that simply withered away, where victims were exposed as objects that held no value in the eyes of yet another state institution, where they were made invisible, that my despair was greatest.

When we went into the field in KZN we had learnt important lessons. We had more help, employing eight fieldworkers, who worked together on the dockets. That study is looking at a much larger number of cases involving social contact crimes, including murder and rape. The rape and murder cases, in particular, were split between researchers and repeated exposure was limited. We worked much shorter shifts. Nobody worked alone at a police station and regular debriefing was provided, both informally within the group and with a clinical social worker. This more systematic approach to caring for our own mental and emotional well-being made the research experience much more manageable.

#### RESEARCH SITES

As described in Chapter 1, for the purposes of this study four police stations were selected in the Cape Town Metropole. These are Fish Hoek, Muizenberg, Ocean View and Simon's Town. Together the four stations represent a discrete geographic region, the South Peninsula, which stretches from the Atlantic to the Indian Ocean across the Silvermine Mountains and to Cape Point, at the far south-west corner of the African continent. The region covers a portion of the population that includes all ethnic populations in the Western Cape, with each police station selected serving a cross-section of the population. Within each jurisdiction there is a wide variance in living conditions and access to social goods.

All four of the Western Cape police stations were served by the Steenberg Family Violence, Child Protection and Sexual Offences (FCS) Unit, based at Wynberg Police Station, some 15-25 kilometres from the four stations. Officially established in 1995, these specialised units are responsible for investigating a range of offences relating to family and sexual violence and the abuse of children. Their mandate is to deal with family violence, including assault with the intention to do grievous bodily



harm (assault GBH) and attempted murder; child protection; kidnapping; abduction; pornography, sexual exploitation and sexual offences. Detectives working in the FCS Units are required to undertake a specialised Family Violence, Child Protection and Sexual Offences Course in addition to their detective training. The Steenberg FCS Unit served 13 police stations in all, with detectives carrying between 35-45 rape dockets at any one time. On average each of the detectives interviewed for this study was receiving between three to five new rape dockets a week. In 2007 the unit had only eight detectives, supplemented by eight 'student' officers, who helped with administration but did not deal directly with victims. The unit seldom functioned at optimum strength: staff members took annual leave on rotation and most of the dockets in this study had the investigating officer on stress leave or on a police course at some time during the investigation.

In KwaZulu-Natal, our choice of police stations was also determined by the wish to focus on a discrete geographical area, but it was dictated too by ongoing research at the University of Cape Town's Centre for Law and Society. That research is seeking to understand the nature of vernacular dispute management processes and the relationship of those processes to the criminal justice system. The initial part of the project was based at six sites in the Msinga area, so we selected police stations that served those sites and would complement the data we were already collecting. The stations selected were Tugela Ferry, Weenen, Muden and Greytown. Again, the stations provided us with an interesting cross-section of the population. These police stations are served by an FCS Unit in Greytown.

## Interviews

I conducted semi-structured interviews with police officers responsible for investigating rape cases coming from the target police stations. Each detective was responsible for between eight and ten of the dockets in the study. No names or identifiers are provided.<sup>471</sup> The interviews were planned to obtain police perspectives on, *inter alia*:

- the challenges of investigating sexual offences cases;
- their views and concerns regarding false allegations at their police stations;

- the issue of financial compensation paid to the victims by the perpetrator;
- the extent to which gang intimidation plays a role in victim withdrawals;
- the factors that lead them to believe that one of these situations has occurred;
- their reasons for disposing of a case as unfounded;
- the extent of their interaction with complainants during the investigation;
- the extent to which police officers actively dissuade complainants from continuing with a case that they consider lacks merit; and
- the extent to which they are influenced by how they think a prosecutor would view the case.

Informal discussions were held with senior prosecutors, magistrates and NGO staff members working with rape survivors. These provided a useful 'insider insight' against which to test the conclusions that I was reaching as an 'outsider'.

## **Rape Crisis database**

Data was obtained from the Rape Crisis client database on cases where clients had specified that they had either reported or chosen not to report being raped to the police. The reasons for these decisions were analysed thematically, as were comments on their experiences with the police and post-coded using Nvivo, a qualitative software package. In total 591 reports were analysed, of which 357 cases (60.4 per cent) were reported and the remaining 234 (39.6 per cent) were not. It is important to note that these records reflected only those cases where the decision to report was referenced. It is possible that in other cases the question was not posed to the survivor or her response not adequately captured on the database. No inferences as to reporting rates should therefore be drawn from this data. No identifiers were provided and there is no way of linking the Rape Crisis records to any of those considered in the docket analysis.

## Analysis

Each docket took between two and four hours to analyse, and because the dockets were available only during office hours only two to four dockets could feasibly be disposed of by one person in a day. Given the emotionally taxing content of the files it was probably for the best. Much of the template was pre-coded to facilitate data entry into a Microsoft Excel spreadsheet. This spreadsheet was in turn entered into the Statistical Programme for Social Scientists (SPSS) and analysed by a statistician who provided me with results in the form of basic frequencies and cross-tabulations. Given the relatively small sample size and the objectives of the study, there was little reason to do further inferential analysis on the data, which is, consequently, largely descriptive.

Because of the nature of the study, allowance was made on the data collection template for the entry of qualitative data, including transcripts of withdrawal and other statements, and comments on the management of the case. These entries were analysed qualitatively and manually post-coded on the basis of broad themes. While themes were identified going into the research, others were added as they emerged from the analysis. Where relevant and useful, some of this qualitative data was quantified to establish frequencies, although the numbers are generally small. A separate Excel spreadsheet captured data entered from the J88 forms, which records the findings of the medical examination.

Quotes from the interviews are provided in the text verbatim. South Africa is a multilingual country with 11 official languages, all in daily use. Most people are multilingual. Detectives interviewed spoke English, Xhosa and Afrikaans as first languages. Many of the documents cited in this study were written by people for whom English is a second or third language. It inevitably shows in spelling and grammar. All extracts are faithfully transcribed. Where language use is 'flawed' in terms of standard conventions, it is left as found without the addition of 'sic' to indicate a deviation from some supposed norm of written communication. My only concern is that meaning is not obscured.

Other data that was not captured in a structured manner includes input from key informants, the researcher's diary, and field notes, which have been included in the analysis on an ad hoc basis, where relevant.

Findings are described thematically, with qualitative findings from docket analysis, Rape Crisis database and interviews with criminal justice personnel interspersed with quantitative findings. The case histories are told narratively, and, as far as possible, extracts from the victims' initial complaints and withdrawal statements are transcribed verbatim. These are used to convey the context of the violence and the complexity of the process.

## End Notes

- 1 Quoted in Verashni Pillay. (2008). Abuse victims 'must persevere'. *Cape Times*. Retrieved from <<http://www.news24.com/SouthAfrica/News/Abuse-victims-must-persevere-20080901>>.
- 2 The crime kit is a Sexual Assault Evidence Collection Kit (SAECK), used for gathering forensic evidence from the body of the victim. Although the collection of evidence is done by the examining medical doctor, SAECKs are issued under the authority of the police.
- 3 Samuel Walker. (1993). *Taming the System: The Control of Discretion in Criminal Justice 1950-1990*, 81, drawing on the President's Commission on Law Enforcement and Administration of Justice. (1967). *Task Force Report: Science and Technology*, 61. Samuel Walker talks about a 'funneling process'. Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293), 7, describe attrition as 'the process by which cases drop out of the legal process [and] thus do not result in conviction'. Hawkins and others, working on regulatory processes, make the point that attrition per se is not necessarily problematic, a point which tends to be missed by writers concerned with attrition as it pertains specifically to rape cases; Keith Hawkins. (1992). The Use of Legal Discretion: Perspectives from Law and Social Science. In Keith Hawkins (Ed.), *The Uses of Discretion*. Also David P. Bryden & Sonja Legnick. (1987). Rape in the Criminal Justice System. *Journal of Criminal Law & Criminology*, 87, 1194, 1208 (describing the numerous reasons why cases may be lost from the criminal justice system).
- 4 For example, Shane Muldoon, S. Caroline Taylor & Caroline Norma. (2013). Patterned Characteristics and Discontinued Sexual Assault Complaints in the Criminal Justice Process. *Current Issues in Criminal Justice*, 24(3), 395; Megan A. Alderden & Sarah E. Ullman. (2012). Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases. *Violence Against Women* 18, 525; Michelle Burman, Linda Lovett, Liz Kelly. (2009). Scotland Country Report: Different systems, similar outcomes? Tracking attrition in reported rape cases in 11 European countries; Kathleen Daly & Brigitte Bouhours. (2010). Rape and attrition in the legal process: a comparative analysis of five countries. *Crime and Justice* 39, 565; Jacqueline Fitzgerald. (2006). The Attrition of Sexual Offences From

- the New South Wales Criminal Justice System. *Crime and Justice Bulletin*, 92, 1; Jennifer M. Brown, Carys Hamilton & Darragh O'Neill. (2007). Characteristics Associated With Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors. *Psychology, Crime & Law*, 13, 4, 355, 357.
- 5 Susan Estrich. (1987). *Real Rape: How the Legal System Victimises Women Who Say No*; Zsuzsanna Adler. (1987). *Rape on Trial*; Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*; Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293).
- 6 Susan Estrich. (1987). *Real Rape: How the Legal System Victimises Women Who Say No*; Zsuzsanna Adler. (1987). *Rape on Trial*; Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*; Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293). Carol Smart. (1990). Law's Truth/Women's Experience. In Regina Graycar (Ed.), *Dissenting Opinions: Feminist Explorations in Law and Society*, 7-9: 'Where women resort to law, their status is always already imbued with specific meaning arising out of their gender. They go to law as mothers, wives, sexual objects, pregnant women, deserted mothers, single mothers and so on ... In going to law women carry with them cultural meaning about pregnancy, heterosexuality, sexual bodies.' Janice Du Mont, Karen-Lee Miller & Terri L. Myhr. (2003). The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women. *Violence Against Women*, 9(4), 466, 469 suggest: 'Rape mythology characterizes rape as an act of violent, forceful penetration committed by a stranger during a blitz attack in a public, deserted place. The victim is portrayed as a morally upright white woman who is physically injured while resisting.'
- 7 Patricia Esteal. (1998). Rape in Marriage: Has the Licence Lapsed? In Patricia Esteal (Ed.), *Balancing the Scales: Rape, Law Reform and South African Culture*. South Africa criminalised marital rape in 1993 through section 4 of the Prevention of Family Violence Act 133 of 1993.
- 8 Robert Reiner. (1994). Policing and the Police. In Mike Maguire, Rod Morgan & Robert Reiner (Eds.), *The Oxford Handbook of Criminology*, 705; Peter Manning describes the police perspective as one in which '... people in general are viewed as stupid, fallible, greedy, lustful, immoral and hypocritical ... a translucent Machiavelli, easily uncovered by insightful probing or public action.' Peter Manning. (1977). *Police Work*, 26.
- 9 Rape scholars have not been entirely unsympathetic to the operational

- difficulties faced by the police. This point is made by Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267, and acknowledged by Jennifer Temkin, but otherwise seldom raised in the literature on rape attrition. Jennifer Temkin. (1997). Plus ça change: Reporting Rape in the 1990s. *British Journal of Criminology*, 37, 507.
- 10 The seminal ABF survey into the criminal justice system defines these 'low visibility decisions' as '... crime investigation and case processing not commonly litigated, not ordinarily mentioned in codes or standards, and not known by persons outside the system'. Michael Tonry. (1993). Surveying Discretion by Criminal Justice Decision Makers. In Lloyd E. Ohlin & Frank J. Remington (Eds.), *Discretion in Criminal Justice: The Tension between Individualisation and Uniformity*, 9. These are contrasted with high visibility decisions like arrest, charging, adjudication, and sentencing. Also Joseph Goldstein. (1960). Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice. *Yale Law Journal*, 69(4), 587.
  - 11 Lisa Vetten, Rachel Jewkes, Romi Sigsworth, Nicola Christofides, Lizle Loots & Olivia Dunseith. (2008). *Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng*.
  - 12 Elisabeth M. Iglesias. (1996). Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality. *Vanderbilt Law Review*, 49, 868, 871.
  - 13 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 16; Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293), 30.
  - 14 An excellent survey by Statistics Canada found, for example, that only 6 per cent of rapes identified by the survey had been reported. Statistics Canada. (1993). *The Violence Against Women Survey: Survey Highlights*. Also Mary Koss, Christine A. Gidycz & Nadine Wisniewski. (1987). The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students. *Journal of Consulting and Clinical Psychology*, 55(2), 162; Joel Epstein & Stacia Langenbahn. (1994). *The Criminal Justice and Community Response to Rape* (National Institute of Justice Series, Issues and Practices in Criminal Justice); Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*; Linda L. Holmstrom & Ann W. Burgess. (1978). *The Victim of Rape: Institutional Reactions*; Jessica Harris & Sharon Grace. (1999). *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (Home Office Research Study 196). Reviewing the literature on attrition Liz Kelly concludes that 'the two major gateways within the CJS are police decisions to crime/ found the case and prosecutors' decisions to support charges and initiate

- proceedings.' Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 3.
- 15 Methodologically, it would require surveying or otherwise interviewing victims. Most studies suggest that those victims who have had the worst experiences with the police are often the most reluctant to participate in such studies. Jennifer Temkin. (1999). Reporting Rape in London: A Qualitative Study. *Howard Journal of Criminal Justice*, 38, 18.
  - 16 Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267, 268.
  - 17 Keith Hawkins. (1992). The Use of Legal Discretion: Perspectives from Law and Social Science. In Keith Hawkins (Ed.), *The Uses of Discretion*, 29.
  - 18 Robert Baldwin & Keith Hawkins. (1984). Discretionary Justice: Davis Reconsidered. *Public Law, Winter*, 570, 582.
  - 19 Estrich notes that '... in certain basic respects the criminal justice system operates no differently with respect to rape complaints than with respect to other crimes ... it is precisely by treating rape the same as other crimes that the criminal justice system manages to duplicate in every-day practice the most oppressive aspects of the common law tradition.' Susan Estrich. (1986). Rape. *Yale Law Journal* 95(6), 1087, 1162. Also Jim Galvin & Kenneth Polk. (1983). 'Attrition in Rape Case Processing: Is Rape Unique?' *Journal of Research in Crime & Delinquency*, 20, 126.
  - 20 Jonathan Burchell & John Milton. (1997). *Principles of Criminal Law* (2nd ed.), 498.
  - 21 Bachman and Paternoster, for example, found higher attrition rates compared to other crimes. Ronet Bachman & Raymond Paternoster. (1993). A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come? *Journal of Criminal Law & Criminology*, 84, 3; Ronet Bachman. (1998). The Factors Related to Rape Reporting Behavior and Arrest. New Evidence from the National Crime Victimization Survey. *Criminal Justice and Behavior*, 25, 8. In Australia, Fitzgerald's 2006 review of attrition of sexual offences in New South Wales found that only 15 per cent of cases involving child victims and 19 per cent involving adult victims were prosecuted. Jacqueline Fitzgerald. (2006). The Attrition of Sexual Offences From the New South Wales Criminal Justice System. *Crime and Justice Bulletin*, 92. Fewer than half (44.4 per cent and 41.7 per cent respectively) resulted in a conviction, translating into a conviction rate of 8 per cent for children and 10 per cent for adult rapes. (It is important to note that these findings were based on cases where the criminal proceedings were initiated within six months of reporting. The writer notes that as cases sometimes take longer than this to reach court it is likely that the rate is in fact slightly higher). Fitzgerald found that rape complaints were substantially more likely to be withdrawn by the complainant, with this category applying to 36 per cent of rapes, compared with 7 per cent across all crime categories and 14 per cent for assault complaints. Suspects were also far more likely to enter a guilty plea in



- non-sexual assault cases. In 48 per cent of assault cases the accused pleaded guilty, versus only 24 per cent of rape cases. Interestingly, she noted that more people accused of sexual assault were represented in court than any other crime category.
- 22 Sharon Stanton, Margot Lochrenberg & Veronica Mukasa. (1997). *Improved Justice for Survivors of Sexual Violence? Adult Survivors' Experiences of the Wynberg Sexual Offences Court and Associated Services*.
- 23 CIETAfrica. (1998). *Prevention of Sexual Violence: A Social Audit of the Role of the Police in the Jurisdiction of Johannesburg's Southern Metropolitan Local Council*; Neil Andersson & Sharmila Mhatre. (2003). Do Unto Others—And Pay The Price: Combating sexual violence in the south of Johannesburg. *SA Crime Quarterly*, 3, 5. They did not appear to follow up to see whether prosecutions were in fact initiated. The study was not particularly robust. To start with, the data on case disposition came from a South African Police Service (SAPS) database and is therefore subject to all the attendant secondary input problems associated with identifying the reasons why a case was discontinued. Furthermore, the survey data is integrated in a way that makes it difficult to distinguish from the police data. A careless reading of the text suggests, for example, that one in 20 cases is *in fact* lost fraudulently—and this is an often-cited conclusion—when the authors are reporting on the *perceptions* of respondents in their victim survey. Most importantly, it is not at all clear what lies in the huge gap between 'reporting' and 'becoming a rape case'. This is primarily because the authors do not specify when a report becomes a 'case'. One would think that this happens when a case docket is registered. However, the authors seem to lump together cases that are never entered on the crime management information system, those reclassified as indecent assault or domestic violence (which means they are in the system, albeit not as rape cases), and those in which the victim decides or is persuaded to drop the case. This would suggest that the attrition of 94 per cent of cases subsequent to 'reporting' includes, at least, victim and police withdrawals.
- 24 A guilty verdict was obtained in 6.8 per cent of adult rape cases reported and 8.9 per cent of child rapes. Conviction rates in some provinces were as low as 3-4 per cent. Crime Information Analysis Centre. (2002). *CIAC Monitor Analysis: Rape and Attempted Rape Statistics as of June 2001*.
- 25 Crime Information Analysis Centre. *Docket Analysis: Selected Areas: RSA Rape Cases Disposed of as Withdrawn*. (On file).
- 26 Lillian Artz, Dee Smythe & Ted Leggett. (2004). *Reflections on Integrated Rape Case Management*.
- 27 Lisa Vetten, Rachel Jewkes, Romi Sigsworth, Nicola Christofides, Lizle Loots & Olivia Dunseith. (2008). *Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng*, 8. A further 2.1 per cent of cases charged as rape resulted in convictions for lesser sentences, bringing the total conviction rate to 6.2 per cent.
- 28 Jeanne Gregory & Sue Lees. (1999). *Policing Sexual Assault*, 33. Lynne

- Henderson suggests that this has served to create 'a presumption of moral innocence for men and a presumption of moral guilt for women in sexual interactions', which permeates both our social values and criminal justice responses. Lynne Henderson. (1993). Getting to Know: Honoring Women in Law and in Fact. *Texas Journal of Women & the Law*, 2, 41, 42.
- 29 Susan Caringella-MacDonald. (1984). Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan. *Women & Politics*, 4, 65, 66.
- 30 Susan Estrich. (1987). *Real Rape: How the Legal System Victimises Women Who Say No*; Susan Estrich. (1986). Rape. *Yale Law Journal*, 95(6), 1087.
- 31 Estrich also refers to this as the 'traditional rape', describing it as an assault where '(a) stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse.' Susan Estrich. (1986). Rape. *Yale Law Journal*, 95(6), 1087, 1092. Social-psychological studies on rape myth acceptance support this view. For example, Diana L. Payne, Kimberly A. Lonsway & Louise F. Fitzgerald. (1999). Rape Myth Acceptance: Exploration of its Structure and its Measurement using the Illinois Rape Myth Acceptance Scale. *Journal of Research in Personality*, 33, 27. These studies point to subjective assessments relating to who is likely to be a victim or perpetrator, where rapes do and don't occur, the level of violence and resistance typically involved, and the role of precipitating conduct (e.g. being drunk, teasing or not being clear enough in saying no). Zoë D. Peterson & Charlene L. Muehlenhard. (2004). Was It Rape? The Function of Women's Rape Myth Acceptance and Definitions in Labeling their Own Experiences. *Sex Roles*, 51(3/4), 129, 142-143. Peterson et al sketches out graphically the 'tests or hurdles any rape would need to pass'. These include questions such as: Was it rape? Was it her fault? Did it really happen? Did she want it to happen? Did he mean to do it? Is it important (as opposed to trivial)? Is it a common (as opposed to deviant) event? Their analysis suggests that rapes are only acknowledged and taken seriously when an event passes all these 'screening questions'. Also Bettina Frese, Miguel Moya & Jesus L. Megias. (2004). Social Perception of Rape: How Rape Myth Acceptance Modulates the Influence of Situational Factors. *Journal of Interpersonal Violence*, 19(2), 143; Shirley Feldman-Summers & Gayle C. Norris. (1984). Rape As Viewed By Judges, Prosecutors, and Police Officers. *Criminal Justice and Behavior*, 7(1), 19.
- 32 Zsuzsanna Adler. (1987). *Rape on Trial*.
- 33 Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607, 625; Paivi Honkatukia. (2001). Rough Sex? Understandings of Rape in Finnish Police Reports. *Journal of Scandinavian Studies in Criminology & Crime Prevention*, 2(1), 15, 16. Honkatukia talks about 'normative' rapes ('for which [the victim] is regarded as at least partly responsible') and 'non-normative' rapes ('acts which are both criminalized and socially disapproved of').
- 34 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*.

- 35 Ian F. Haney Lopez. (2000). Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination. *Yale Law Journal*, 109, 1717, 1781.
- 36 Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267.
- 37 Lisa Frohmann. (1990). Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections. *Social Problems*, 38, 2, 271. An illuminating description of this phenomenon is supplied by Alfred Schutz, who refers to it as 'cook-book knowledge':

The cook-book has recipes, lists of ingredients, formulae for mixing them, and directions for finishing off. This is all we need to make an apple pie, and also all we need to deal with the routine matters of daily life. ... Most of our daily activities from rising to going to bed are of this kind. They are performed by following recipes reduced to automatic habits or unquestioned platitudes.
- Alfred Schutz. (1964). The Problem of Rationality in the Social World. In Arvid Brodersen (Ed.), *Collected Papers: Studies in Social Theory*, 73-4.
- 38 Lisa Frohmann. (1990). Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections. *Social Problems*, 38, 2, 217-219.
- 39 Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267.
- 40 Jennifer Temkin. (1999). Reporting Rape in London: A Qualitative Study. *Howard Journal of Criminal Justice*, 38, 17. Jacqueline Fitzgerald. (2006). The Attrition of Sexual Offences From the New South Wales Criminal Justice System. *Crime and Justice Bulletin*, 92, 1, 11: 'The likelihood of conviction exerts an influence on the attrition decisions made at every point in the criminal justice system and is a key area for improvement and reform.'
- 41 For example, Christiane Amanpour. (1997). *South Africa copes with skyrocketing rape, abuse rates*. Retrieved from <<http://www.cnn.com/WORLD/9702/23/safrica.rapes/>>, accessed on 2 August 2014. Naomi Larkin, *Now 'Rape Town' can't fund own crisis centre*, Cape Argus, July 14, 1999. Retrieved from <<http://allafrica.com/stories/199907140187.html>>, accessed 2 August 2014.
- 42 Patrick Burton, Anton Du Plessis, Ted Leggett, Antoinette Louw, Duxita Mistry & Hennie Van Vuuren. (2004). *National Victims of Crime Survey: South Africa*, 47-49, where rape/sexual assault was reported to rank after murder and housebreaking as the crime most feared by *all* South Africans, and the crime most feared by women.
- 43 Mark Malan. (1999). Police reform in South Africa: Peacebuilding Without Peacekeepers. *African Security Review*, 8(3), 1, 2.
- 44 South African Institute of Race Relations. (1994). *Race Relations Survey 1993/94*, 299.
- 45 Jacqueline Cock. (1994). Keeping the Home Fires Burning: Militarisation and the Politics of Gender in South Africa. *Review of African Political*

- Economy*, 45/46; and Sue Armstrong. (1994). Rape in South Africa: An Invisible Part of Apartheid's Legacy. *Gender and Development: Population and Reproductive Rights*, 2(2), 35. A parliamentary committee report noted in 2000 that South Africa was a country where masculinity had been shaped by a violent and highly militarised context, in which violence was viewed as a legitimate means of resolving conflicts and 'tough, aggressive, brutal and competitive masculinity is promoted'. Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women. (2000). *Report on Violence against Women in South Africa*, 53.
- 46 Mark Shaw & Peter Gastrow. (2001). Stealing the Show? Crime and Its Impact in Post-Apartheid South Africa. *Daedalus*, 130(1), 235, 238.
- 47 Jonathan Burchell & John Milton. (1997). *Principles of Criminal Law* (2nd ed.), 487.
- 48 Total reported sexual offences in South Africa between 2003-2013 area as follows: 2003/2004: 66 079; 2004/2005: 69 117; 2005/2006: 68 076; 2006/2007: 65 201; 2007/2008: 63 818; 2008/2009: 70 514; 2009/2010: 68 332; 2010/2011: 66 196; 2011/2012: 64 514; 2012/2013: 66 387. Source: <www.saps.gov.za>.
- 49 For example, Lillian Artz & Kristi Kunisaki. (2003). *Rape During Armed Conflict and Reflections on the 'Uncivil War' on Women in South Africa*. Artz & Kunisaki point to factors such as the high levels of mutilation and other injuries that attend rape in South Africa, as well as the prevalence of multiple perpetrator and gang rapes and forced pregnancy.
- 50 Lu-Anne Swart, Angela Gilchrist, Alex Butchart, Mohamed Seedat & Lorna Martin. (2000). Rape surveillance through district surgeon offices in Johannesburg, 1996-1998: Findings, evaluation and prevention implications. *South African Journal of Psychology*, 30(2), 1; Lorna Martin. (1999). *Violence against Women: an Analysis of the Epidemiology and Patterns of Injury in Rape Homicide in Cape Town and in Rape in Johannesburg*.
- 51 Naeemah Abrahams, Lorna Martin, Rachel Jewkes, Shanaaz Mathews, Lisa Vetten & Carl Lombard. (2008). The Epidemiology and the Pathology of Suspected Rape Homicide in South Africa. *Forensic Science International*, 178(2-3), 132; Naeemah Abrahams, Shanaaz Mathews, Rachel Jewkes, Lorna Martin & Carl Lombard. (2012). *Every Eight Hours: Intimate Femicide in South Africa 10 Years Later!* Retrieved from <<http://www.mrc.ac.za/policybriefs/veryeighthours.pdf>>, accessed on 2 August 2014.
- 52 Shanaaz Mathews, Naeemah Abrahams, Lorna Martin, Lisa Vetten, Lize Van Der Merwe & Rachel Jewkes. (June 2004). *Every Six Hours a Women is Killed by her Intimate Partner: a National Study of Female Homicide in South Africa*.
- 53 South African Department of Health. (2011). *22nd National Antenatal Sentinel HIV and Syphilis Prevalence Survey*.
- 54 South African Department of Health. (2008). *South African National HIV Survey*.

- 55 Rachel Jewkes & Naeema Abrahams (2000) *Violence Against Women in South Africa: A Review Study*.
- 56 Mamphele Ramphele & Emile Boonzaier. (1988). The Position of African Women: Race and Gender in South Africa. In Emile Boonzaier & John Sharp (Eds.), *South African Keywords: The Uses and Abuses of Political Concepts*, 165. The authors argued that:

The issue of gender does not constitute an obvious element in the political discourse in South Africa. It is commonly felt that 'race relations' form the core of the political debate and that concern about gender relationships is either irrelevant or overshadowed by the more pressing problems associated with relationships between different races, ethnic groups, cultures, tribes and so on.
- 57 Desiree Hansson remarks that: '... feminism did not really make inroads into progressive politics, since racism was constructed as the oppression, and feminism was viewed as a potentially divisive element'. Desiree Hansson. (1995). Agenda-ing Gender: Feminism and the Engendering of Academic Criminology in South Africa. In Nicole Rafter & Frances Heidensohn (Eds.), *International Feminist Perspectives in Criminology*, 40. Also Penny Andrews. (Spring 1999). Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law. *Temple Political and Civil Rights Law Review*, 425; Felicity Kaganas & Christina Murray. (1994). Law and Women's Rights in South Africa: An Overview. In Christina Murray (Ed.), *Gender and the New South African Legal Order; Nomboniso Gasa. (2007). Basus'iimbokodo, Bawel'imilambo, New Freedoms and New Challenges: A Continuing Dialogue. In Nomboniso Gasa (Ed.), Women in South African History: Basus'iimbokodo, Bawel'imilambo.*
- 58 Amanda Kemp, Nozizwe Madlala, Asha Moodley & Elaine Salo. (1995). The Dawn of a New Day: Redefining South African Feminism. In Amrita Basu (Ed.), *The Challenge of Local Feminism*, 142. It was even argued by one commentator that 'Black men are powerless and subsequently are incapable of oppressing or exploiting their women'. Umtapo Focus November 1987, 12.
- 59 Amanda Kemp, Nozizwe Madlala, Asha Moodley & Elaine Salo. (1995). The Dawn of a New Day: Redefining South African Feminism. In Amrita Basu (Ed.), *The Challenge of Local Feminism*, 143. Kemp et al, point out that in dealing with gender inequity 'strategic decisions had to be made about how and when they could afford to make gender issues public given the real threat of a genocidal state to their very lives'. Also Changu Mannathoko. (1992). Feminist Theories and the Study of Gender Issues in Southern Africa. In Ruth Meena (Ed.), *Gender in Southern Africa: Conceptual and Theoretical Issues*.
- 60 Dee Smythe & Penny Parenzee. (2004). Acting Against Domestic Violence. In Bill Dixon & Elrena van der Spuy (Eds.), *Justice Gained? Crime and Crime Control in South Africa's Transition*, 40; Desiree Hansson. (1995).

Agenda-ing Gender: Feminism and the Engendering of Academic Criminology in South Africa. In Nicole Rafter & Frances Heidensohn (Eds.), *International Feminist Perspectives in Criminology*, 40: '... organised feminism has only had a significant impact within mainstream South African politics in the past five years, and in political practice sexism is still treated as secondary to both racism and classism.' Hansson, at 41, argues that this situation has '... stunted the production of feminist discourses [so that] relatively little feminist knowledge was produced before the 1990s.' For many of the same reasons, there was also very little engagement from progressive lawyers with the problem of sexual violence. Sustained civil society, academic and government engagement with the issue only began to find a voice in the space opened up by South Africa's transition to democracy, and very soon—by dint of historical circumstance and drawn, no doubt, by what Smart has termed 'the siren call of law' in Carol Smart. (1986). *Feminism and Law: Some Problems of Analysis and Strategy. International Journal of the Sociology of Law*, 14(1), 109, 160.—those energies came to be directed towards rape law reform. Thus occupied, this particular strand of legal activism all but ignored the actual functioning of the police, the front-line institution tasked with implementing those laws.

- 61 From its establishment in 1973, for example, the South African Law Reform Commission initiated 134 investigations into various aspects of the law that required 'improving, developing or modernizing'. Of these, 61 (46 per cent) were initiated after 1994. Many of these post-apartheid investigations deal with complex socio-legal issues, including the status of Islamic marriages, the legal consequences of sexual re-alignment (Project 52), Jewish divorces (Project 76), the rights of natural fathers of children born out of wedlock (Project 79), aspects of the law relating to AIDS (Project 85), juvenile justice (Project 106) and sexual offences (Project 107). I have previously critiqued the South African Law Reform Commission's lack of capacity to deal adequately with these complex social problems based on their current use of lawyers to conduct the required research, to the exclusion of social scientists. Dee Smythe. (2004). *Underestimating Institutions*. Unpublished JSM Thesis, Stanford University.
- 62 Dee Smythe & Penny Parenzee. (2004). Acting Against Domestic Violence. In Bill Dixon & Elrena van der Spuy (Eds.), *Justice Gained? Crime and Crime Control in South Africa's Transition*, 46.
- 63 Desiree Hansson. (1995). Agenda-ing Gender: Feminism and the Engendering of Academic Criminology in South Africa. In Nicole Rafter & Frances Heidensohn (Eds.), *International Feminist Perspectives in Criminology*, 40.
- 64 Jacklyn Cock. (2007). Another mother for peace': women and peace building in South Africa, 1983—2003. In Nombonisa Gasa (Ed.), *Women in South African History: Basus'iimbokodo, Bawel'imilambo*.
- 65 Nombonisa Gasa (Ed.), *Women in South African History: Basus'iimbokodo, Bawel'imilambo*.



- 66 This included the passage of the Domestic Violence Act 116 of 1998, only six years after the National Party government had passed the Prevention of Family Violence Act 133 of 1993, and the push to reform and codify South Africa's common law-based rape laws. For a discussion of South Africa's domestic violence legislation see Dee Smythe & Penny Parenzee. (2004). Acting Against Domestic Violence. In Bill Dixon & Elrena van der Spuy (Eds.), *Justice Gained? Crime and Crime Control in South Africa's Transition*, 40. Lillian Artz & Dee Smythe (Eds.) (2008), *Should We Consent? Rape Law Reform in South Africa* provides a useful insight into the politics of South Africa's rape law reform process.
- 67 Jo Beall, Stephen Gelb & Shireen Hassim. (2005). Fragile stability: State and society in democratic South Africa. *Journal of Southern African Studies*, 31(4), 681.
- 68 The testimony led in the Khayelitsha Commission provides a remarkable record of this breakdown in trust between police and the communities they serve, as well as the violence that results. The testimony and final report of the Commission is available at <http://www.khayelitshacommission.org.za/>.
- 69 Duxita Mistry, Rika Snyman & Marielize van Zyl. (2001). *Social Fabric Crime in the Northern Cape*, 3.
- 70 Sue Lees. (1996). *Carnal Knowledge: Rape on Trial*, 99. Fitzgerald points out that 'the high level of attrition of sexual assault cases from the justice system erodes the capacity of criminal sanctions to act as a deterrent to sexual offenders.' Jacqueline Fitzgerald. (2006). The Attrition of Sexual Offences From the New South Wales Criminal Justice System. *Crime and Justice Bulletin*, 92, 1, 11.
- 71 Statistics South Africa. (2001). *Census 2001*; Tukufu Zuberi, Amson Sibanda & Eric O. Udjo. (2005). *The Demography of South Africa*.
- 72 Based on the fact that 55,114 rapes were reported to the police during the 2004/5 reporting period (1 April 2004 to 31 March 2005). I have simply divided the number of reported rapes by 365 days to obtain a broad, and not particularly scientific, estimate.
- 73 Based on the estimate that 1 in 9 rapes is reported to the police. Rachel Jewkes, Loveday Penn-Kekana, Jonathan Levin, Matsie Ratsaka & Margaret Schriber. (1999). 'He must give me money he mustn't beat me'. *Violence against women in three South African Provinces: Medical Research Council Technical Report*, 60. There is no agreement on the extent of under-reporting in South Africa.
- 74 David Garland. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*, 124 and 125.
- 75 Ronald Dworkin. (1977). *Taking Rights Seriously*, 31. Dworkin famously states that 'discretion does not exist except as an area left open by a surrounding belt of restriction'. Kleinig refers to it as a 'ring of norms'. John Kleinig. (1996). Handling Discretion with Discretion. In John Kleinig (Ed.), *Handled With Discretion: Ethical Issues in Police Decision Making*, 3.
- 76 The South African Constitution specifically requires our courts to make decisions that are coherent with international law and allows them to

take cognisance of comparative jurisprudence. Section 39(1) provides that:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.

- 77 Including regulation of the accused's rights in respect of arrest, access to bail, access to the docket and other fair trial rights, in the first instance, but also—more indirectly—in the collection of *evidence*.
- 78 Including regulations governing how cases should be investigated, when they should be handed over for prosecution, and when and how they may be closed.
- 79 John Kleinig. (1996). Handling Discretion with Discretion. In John Kleinig (Ed.), *Handled With Discretion: Ethical Issues in Police Decision Making*, 65: 'The interests of race, gender, and class may help to structure discretionary provisions or, more likely, may infect particular exercises of discretion, thus making it important that opportunities for discretionary judgments be accompanied by guidelines and also be regularly monitored.'
- 80 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 2.
- 81 Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).
- 82 As South Africa prepared to make its first country report in 1997 on the status of South African women to the United Nations this provided a particularly useful tool with which to hold government accountable. Helene Combrinck. (1998). Positive state duties to protect women from violence: Recent South African developments. *Human Rights Quarterly* 20(3), 666.
- 83 UN Doc. A/RES/54/4 (1999).
- 84 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- 85 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the African Union, Maputo, OAU Doc. CAB/LEG/66.6 (Sept. 13, 2000).
- 86 Article 4(2)(g) deals with trafficking in human persons.
- 87 Article 4(2)(h) prohibits medical or scientific experimentation on women without their consent.
- 88 Article 4(2)(j) prohibits carrying out the death penalty on pregnant or nursing mothers.
- 89 Article 4(2)(k) provides for the equal recognition and treatment of women refugees.
- 90 Article H(ix).
- 91 GC1163 FS16 SADC Add.



- 92 Article 8.
- 93 Article 17.
- 94 Dee Smythe & Penny Parenzee. (2004). Acting against Domestic Violence. In Bill Dixon & Elrena van der Spuy (Eds.), *Justice Gained? Crime and Crime Control in South Africa's Transition*, 46.
- 95 Sections 9(1)-9(5).
- 96 The ensuing provision, contained in section 12(1) of the South African Constitution, reads as follows (with my emphasis):  
Everyone has the right to freedom and security of the person, which includes the right-  
(a) not to be deprived of freedom arbitrarily or without just cause;  
(b) not to be detained without trial;  
(c) *to be free from all forms of violence from either public or private sources*;  
(d) not to be tortured in any way; and  
(e) not to be treated or punished in a cruel, inhuman or degrading way.
- 97 UN Doc. A/RES/48/104 (1993).
- 98 Section 10 and section 14 respectively.
- 99 Nico Steytler. (1998). *Constitutional Criminal Procedure*, 1.
- 100 Section 39(1)(b).
- 101 Helene Combrinck. (1998). Positive state duties to protect women from violence: Recent South African developments. *Human Rights Quarterly*, 20(3), 666, 680.
- 102 For example, Naeema Abrahams, Rachel Jewkes & Ria Laubsher. (1999). *'I do not believe in democracy in the home': Men's Relationships with and Abuse of Women Research Report*; Penny Parenzee & Dee Smythe. (2003). *Domestic Violence and Development: Looking at the Farming Context*. Apartheid alone does not explain the prevalence of sexual violence in South Africa, but a failure to recognise that all South Africans will carry the scars of apartheid for generations to come is naïve, dangerous and counter-productive to the project of building an equal society and to transforming our institutions in accordance with shared values.
- 103 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 3.
- 104 The Recommendation notes that 'under general international and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.' Committee on the Elimination of Discrimination Against Women, General Recommendation 19, Violence Against Women, 11<sup>th</sup> session, 1992, UN Doc A/47/38, para. 9.
- 105 Report of the UN Special Rapporteur on Violence Against Women, UN Doc E/CN.4/2006/61, 20 January 2006. For a detailed explication, also see Carin Benninger-Budel. (2008). *Due Diligence and Its Application to Protect Women from Violence*; Report of the UN Special Rapporteur on Violence Against Women, UN Doc A/HRC/23/49, State responsibility for eliminating violence against women, 14 May 2013.

- 106 *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA) (holding the state vicariously liable).
- 107 *Minister of Safety and Security v Van Duivenboden* 2002 AllSA 741 (SCA). Also *Van Eeden v Minister of Safety and Security* 2002 AllSA 346 (SCA) (finding that the police had breached their legal duty towards the applicant, who was raped by a serial rapist who had escaped from police custody).
- 108 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA).
- 109 See *Carmichele v Minister of Safety and Security and Another* 2001(1) SA 489 (SCA).
- 110 At paragraph 28.
- 111 Section 205(3) of the Constitution provides that:  
'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'  
The court also found that although prosecutors were not explicitly tasked in the same way under the Constitution, they had always been under a duty to carry out their functions in the public interest (at 72).
- 112 Section 5 of the Police Act 7 of 1958: 'The functions of the South African Police shall be, *inter alia*—  
the preservation of the internal security of the Republic;  
the maintenance of law and order;  
the investigation of any offence or alleged offence; and  
the prevention of crime.'  
This Act was superseded by the South African Police Service Act 68 of 1995.
- 113 At paragraph 62, internal footnotes omitted.
- 114 *Carmichele v Minister of Safety and Security and Another* 2002 (10) BCLR 1100 (C).
- 115 *Minister of Safety and Security v Van Duivenboden* 2002 AllSA 741 (SCA).
- 116 At 22. A similar finding was made in the case of *Van Eeden v Minister of Safety and Security* 2002 AllSA 346 (SCA). In both cases the court placed substantial emphasis on the state's obligation to protect, promote and enforce the right to freedom from violence.
- 117 One key issue is that the cases have dealt with harm suffered consequent to a failure by the police to comply with their obligations, rather than the harm intrinsic in such a failure.
- 118 I expand on the due diligence standard, and particularly its application in the context of domestic violence in Dee Smythe. (2008). South Africa's Response to Domestic Violence. In Carin Benninger-Budel (Ed.), *State Obligations to End Violence against Women*.
- 119 Jonathan Burchell & John Milton. (1997). *Principles of Criminal Law* (2nd ed.), 487. As such it does not explicitly contain the elements of force and resistance typically, or historically, found in the definitions adopted in

- the United States. John Kaplan, Robert Weisberg & Guyora Binder. (2000). *Criminal Law Cases and Materials* (4th ed.), 1077: a 'typical common-law-based statute [in the US] would define rape as sexual intercourse by means of force, against the will of the woman and without her consent'.
- 120 *S v M* (2) 1990 (1) SACR 456 (N).
- 121 'Indecent assault' is defined as 'an assault which by nature or design is of an indecent character'. Jonathan Burchell & John Milton. (1997). *Principles of Criminal Law* (2nd ed.), 501.
- 122 Section 60 of the Criminal Procedure Act 51 of 1977.
- 123 Criminal Law Amendment Act 105 of 1997, read with the Criminal Law (Sentencing) Amendment Act 38 of 2007. The Act imposes minimum sentences that may be deviated from where there are 'substantial and compelling' circumstances. The Act recommends a sentence of ten years for a first rape conviction, and 15 years for a second conviction or indecent assault against a child under 16 years of age. Life imprisonment is imposed where the victim was under 16 years of age at the time the crime was committed, or disabled, the accused has been convicted of two or more rapes, there was grievous bodily harm, the victim was raped more than once or by more than one person, or where the accused knew that they were HIV positive at the time.
- 124 Section 5 of Act 133 of 1993: 'Notwithstanding anything to the contrary contained in any law, or the common law, a husband may be convicted of the rape of his wife'.
- 125 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. For a detailed commentary on the provisions of the Act see Dee Smythe & Bronwyn Pithey (Eds.). (2011). *Sexual Offences Commentary*. For a description of the law reform process see Lillian Artz & Dee Smythe (Eds.), *Should We Consent? Rape Law Reform in South Africa*.
- 126 These reforms are consonant with changes demanded by rape activists in other Anglo-American jurisdictions. Ronald J. Berger, Patricia Searles & W. Lawrence Neuman. (1988). The Dimensions of Rape Reform Legislation. *Law & Society Review*, 22, 329; Julia Horney & Cassia Spohn. (1991). Rape Law Reform and Instrumental Change in Six Urban Jurisdiction. *Law and Society Review*, 25, 117.
- 127 Pamela J. Schwickard. (2008). Getting Somewhere Slowly—The Revision of a Few Evidence Rules. In Lillian Artz & Dee Smythe (Eds.), *Should We Consent? Rape Law Reform in South Africa*, 72.
- 128 Pamela J. Schwickard. (2008). Getting Somewhere Slowly—The Revision of a Few Evidence Rules. In Lillian Artz & Dee Smythe (Eds.), *Should We Consent? Rape Law Reform in South Africa*. Also Jennifer Temkin. (2002). *Rape and the Legal Process* (2nd ed.); A. Thomas Morris. (1988). The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform. *Duke Law Journal*, 37(1), 154; Lloyd Vogelmann. (1990). *The Sexual Face of Violence: Rapists on Rape*. Although South Africa's highest court described the rule as 'irrational' and 'out-

dated' in *S v Jackson* 1998 (1) SACR 470 (SCA) (at 476e) it left open the possibility of applying it where there was an evidentiary basis for doing so (476e-f).

- 129 Section 60: 'Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.' The South African Law Commission's (SALC) recommendation that the cautionary rule as it pertains to children also be abolished was not accepted by the legislature, despite overwhelming evidence that it lacks utility. South African Law Commission. (2002). *Final Report on Project 107: Sexual Offences*, 176.
- 130 Pamela J. Schwikkard. (2008). Getting Somewhere Slowly—The Revision of a Few Evidence Rules. In Lillian Artz & Dee Smythe (Eds.), *Should We Consent? Rape Law Reform in South Africa*, 72.
- 131 Contained in section 227 of the Criminal Procedure Act 51 of 1977.
- 132 As Schwikkard points out in this regard, deference to the 'fair trial' rights of the accused means 'there is the danger of old practices continuing' (at 41). Cross-examination on complainants' previous sexual history was restricted in 1989 via the Criminal and Criminal Procedure Amendment Act 39 of 1989, which required the court to first determine whether such evidence was relevant. In practice this restriction proved almost wholly ineffective, with the Supreme Court of Appeal indicating in 2002 that it did not know of a single case where the provision had been applied to protect the complainant. Pamela J. Schwikkard. (2008). Getting Somewhere Slowly—The Revision of a Few Evidence Rules. In Lillian Artz & Dee Smythe (Eds.), *Should We Consent? Rape Law Reform in South Africa*. Also *S v M* 2002 (2) SACR 411 (SCA).
- 133 2006 (7) BCLR 790 (W).
- 134 Mmamotsheli Motsei. (2008). *The Kanga and the Kangaroo Court: Reflections on the Rape Trial of Jacob Zuma*. As it is, magistrates report that they seldom, if ever, receive applications of this nature: defence attorneys simply lead the evidence without comment.
- 135 Jonathan Burchell & John Milton. (1997). *Principles of criminal law* (2nd ed.), 494.
- 136 Act 23 of 1957. The Act also governed immoral or indecent acts with a boy under the age of 19 years. Effectively this set the age of consent to sexual intercourse at 16 years for both males and females in the heterosexual context and at 19 years for immoral and indecent acts for both males and females in a homosexual context.
- 137 Section 22(f) of Act 23 of 1957. The prescribed penalty for an offence referred to in section 14(1) was imprisonment for a period not exceeding six months, with or without an additional fine not exceeding R12,000.
- 138 Section 15 reads as follows:
  - (1) A person ('A') who commits an act of sexual penetration with a child ('B') is, despite the consent of B to the commission of such an act, guilty

- of the offence of having committed an act of consensual sexual penetration with a child.
- (2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).
- (b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.
- 139 *Teddy Bear Clinic for the Abused Children and Another v Minister of Justice and Constitutional Development and Another* (73300/10) [2013] ZAGPPHC 1 (4 January 2013); *Teddy Bear Clinic and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35. The Constitutional Court in *Geldenhuys v National Director of Public Prosecutions and Others* 2009 (2) SA 310 (CC) stated that it is constitutionally sound for parliament to set the age of consent at 16.
- 140 Jacqueline Gallinetti, Samantha Waterhouse & Carina Du Toit. (2011). Sections 15-16: Consensual sexual acts with certain children. In Dee Smythe & Bronwyn Pithey (Eds.), *Sexual Offences Commentary*.
- 141 South African Government Inter-departmental Strategy Team (1996). *National Crime Prevention Strategy*, 9.
- 142 Act 116 of 1998.
- 143 South African Police Service. (nd). *Strategic Plan for the South African Police Service 2005-2010*, 39. The 2007/8 Annual Report states that 'detering' sexual offences against women and children has been a priority since 2002. It includes the objectives of improving detection and conviction rates, eliminating secondary victimisation, providing support to victims and improving prevention efforts. South African Police Service. (2008). *Annual Report 2007/8*.
- 144 South African Police Service. (2008). *Annual Report 2007/8*, 41.
- 145 South African Police Service. (nd). *Strategic Plan 2010-2014*, 5.
- 146 South African Police Service. (2005). *Annual Report 2004/5*, 90.
- 147 For example, between April 2005 and March 2006 FCS Unit members presented 1 464 lectures to adults and children 'to alert the community to the combating of sexual and violent crimes.' At the time, nationally, the FCS Units had 1 475 members across 66 units, dealing with 61 252 cases. South African Police Service. (2005). *Annual Report 2004/5*.
- 148 South African Police Service. (2013). *Annual Report 2012/13*, 116.
- 149 South African Police Service. (2013). *Annual Report 2012/13*, 119. In 2013 SAPS reported that 176 FCS Units had been established.
- 150 Lillian Artz & Dee Smythe. (2007). Case Attrition in Rape Cases: A Comparative Analysis. *South African Journal of Criminal Justice*, 20(2), 158, 160.

- 151 In terms of section 25(1)(b) of the South African Police Service Act 68 of 1995. The aim is to provide for the 'establishment and maintenance of uniform standards of policing'.
- 152 Section 5 of NI 3/2008.
- 153 Section 8 of NI 3/2008.
- 154 Section 7(5) of NI 3/2008.
- 155 Section 18.
- 156 Section 19.
- 157 Section 19(2).
- 158 Act 116 of 1998.
- 159 Act 38 of 2005.
- 160 National Instruction 3/2008: Sexual Offences. Government Gazette 31330, 15 August 2008, section 19(2)(c).
- 161 Section 23.
- 162 Section 23(4).
- 163 The South African Law Reform Commission stated in its 2001 Discussion Paper on Sexual Offences that police leadership in this regard has been 'noncommittal'. South African Law Commission. (2001). *Discussion Paper 102 on Project 107: Sexual Offences*, 3.2.9.2.
- 164 South African Police Service Standing Order (General) 325, Issued by Consolidation Notice 46 of 2012.
- 165 Section 325.2.1.1.
- 166 Section 325.2.1.2.
- 167 Section 325.2.1.3. If there is some indication that a 'withdrawn' docket might be required again in the future, it can be endorsed with a date on which it should be brought forward for further perusal. (Section 325.8).
- 168 Section 325.2.2.
- 169 Section 325.2.2.5.1. This decision can only be made by a Station or Unit Commander.
- 170 Section 325.2.1.1.
- 171 Section 325.1.2. At the same time, this responsibility is somewhat watered down by a later provision (section 325.5) allowing that the closing of dockets as 'unfounded', 'undetected' or 'withdrawn' is proof in itself that the oversight instructions have been complied with, allowing the docket to be filed away.
- 172 National Prosecuting Authority of South Africa, Policy on Prosecutions (1 December 2005).
- 173 National Prosecuting Authority of South Africa, Policy on Prosecutions (1 December 2005).
- 174 Lillian Artz, Dee Smythe & Ted Leggett. (2003). *Reflections on Integrated Rape Case Management*. Analysis of cases between January 2001 and May 2003.
- 175 The research analysed case disposition solely on the basis of the categories entered on a database and did not analyse the contents of any dockets.

- 176 Lillian Artz, Dee Smythe & Ted Leggett. (2003). *Reflections on Integrated Rape Case Management*.
- 177 This study reflects the difficulty of determining the extent and effect of prosecutorial involvement. This can also be seen in the CIAC study conducted by the police, where the complainant was identified as the person requesting the withdrawal of the docket in 366 (46.4 per cent) of the cases analysed, while the investigating officer was only identified as responsible in 107 (13.6 per cent) of the cases. The public prosecutor was responsible for withdrawing a significant 38.1 per cent of the sample. This breakdown is probably of less significance than appears at first blush in terms of determining who was in fact responsible for *initiating* the withdrawal. What it more effectively tells us is who has authorised the disposition of the case, that is, whether it was upon affidavit of the complainant or instruction of the prosecutor or police officer. It also suggests that there is fairly general compliance among police officers with the Standing Orders on the closing of dockets. It says little about the exercise of discretion. CIAC Monitor. (2002). *Analysis: Rape and Attempted Rape Statistics as of June 2001*. Thus Frazier & Haney's inference that less attrition at prosecutorial stage reflects that only the strongest cases are referred should be treated with some caution. Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607, 622.
- 178 Mark Cooney. (1994). Evidence as Partisanship. *Law and Society Review*, 28(4), 833, 834 and 838.
- 179 The CIETAfrica study suggests that a substantial number of cases might already be 'lost' to the system at this stage. Neil Andersson, Sharmila Mhatre, Nzwakie Mqotsi & Marina Penderis. (1998). *Prevention of Sexual Violence: A Social Audit of the Role of the Police in the Jurisdiction of Johannesburg's Southern Metropolitan Local Council*. Also Rachel Jewkes & Naeema Abrahams. (2002). The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview. *Social Science and Medicine*, 55(7), 1231.
- 180 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 21.
- 181 Jennifer M. Brown, Carys Hamilton & Darragh O'Neill. (2007). Characteristics Associated With Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors. *Psychology, Crime & Law*, 13, 4, 6.
- 182 Elisabeth A. Stanko. (2006). Theorizing About Violence. *Violence Against Women*, 12(6), 543, 547.
- 183 Linda Richter, Andrew Dawes & Craig Higson-Smith. (2004). *Sexual Abuse of Young Children in Southern Africa*, 183.
- 184 Following Aileen McColgan's admonition that we need to look at the facts of cases and the contexts in which rape most commonly occurs in



- order to understand the disposition of cases. Aileen McColgan. (1996). *The Case for Taking the 'Date' out of Rape*, 17.
- 185 Bruce et al. suggest that '[i]t may be an understatement to say that the context in which the SAPS has operated since 1994 has been one of multi-dimensional turbulence.' David Bruce, Gareth Newham & Themba Masuku. (2007). *In Service of the People's Democracy: An Assessment of the South African Police Service*, 26. In similar vein Newham writes that '[i]n almost every way it is a vastly different organisation from its notorious apartheid predecessor.' Gareth Newham. (2005). Strengthening Democratic Policing in South Africa Through Internal Systems For Officer Control. *South African Review of Sociology*, 36(2), 160.
- 186 David Bayley describes police transformation in South Africa as a 'heartening success' in comparison to other countries. David Bayley. (2006). *Changing the Guard: Developing Democratic Police Abroad*, 115.
- 187 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 3. Monique Marks describes the nature of the South African Police during this time as 'brutal, partisan and corrupt'. Monique Marks. (2000). Transforming Police Organisations from Within. *British Journal of Criminology*, 40, 557, 560.
- 188 Prohibition of Mixed Marriages Act 55 of 1949; Immorality Amendment Act 21 of 1950; Sexual Offences Act 23 of 1957.
- 189 The Natives Land Act 27 of 1913; The Natives (Urban Areas) Act 21 of 1923; Group Areas Act 41 of 1950; Bantu Authorities Act 68 of 1951; Natives Laws Amendment Act 54 of 1952; Coloured Persons Communal Reserves Act 3 of 1961; Bantu Homelands Citizens Act 26 of 1970.
- 190 Bantu Building Workers Act 27 of 1951; Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.
- 191 Reservation of Separate Amenities Act 49 of 1953.
- 192 Suppression of Communism Act 44 of 1950; Terrorism Act 83 of 1967.
- 193 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 7.
- 194 In Rhodesia and South West Africa, subsequently named Zimbabwe and Namibia.
- 195 Former SAP general Louis Eloff describes apartheid police organisations as 'classical military organisations, displaying excessive emphasis on tradition to the detriment of their capability to adapt to a dynamic and changing environment.' He points out further that they were marked by autocratic and hierarchical command and control structures and 'an impersonal and rule-driven environment ... with an insistence on unquestioning obedience and loyalty'. Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Janine Rauch & Elrena van der Spuy (Eds.), *Police Reform in Post-Conflict Africa: A Review*, 55.
- 196 Information about the Marikana Commission of Inquiry is available at <<http://www.marikanacomm.org.za>>, accessed June 2014.
- 197 Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Louis Eloff. (2006). *Transformation of the SAPS: An Insider's View*. In Janine



- Rauch & Elrena van der Spuy (Eds.), Police Reform in Post-Conflict Africa: A Review .*
- 198 Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Janine Rauch & Elrena van der Spuy (Eds.), *Police Reform in Post-Conflict Africa: A Review*, 55.
  - 199 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 22.
  - 200 Mark Shaw & Peter Gastrow. (2001). Stealing the Show? Crime and Its Impact in Post-Apartheid South Africa. *Daedalus*, 130(1), 235, 238.
  - 201 Keith Biddle, Ian Clegg & Jim Whetton. (1989). *Evaluation of ODA/DFID support to the police in developing countries: Synthesis study*.
  - 202 Janine Rauch. (2001). Police Reform and South Africa's Transition, Crime and Policing in Transitional Societies. *South African Institute of International Affairs Seminar Report*, 8, 119, 167.
  - 203 They also received inferior benefits with regard to e.g. housing, transport, and medical aid. Monique Marks. (2000). Transforming Police Organisations from Within. *British Journal of Criminology*, 40, 557.
  - 204 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 21.
  - 205 Cawthra notes that as late as 1992 training at the main police college in Pretoria was conducted solely in Afrikaans and all instructors were white. Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 32.
  - 206 The National Peace Accord signed between FW De Klerk, Nelson Mandela and Mangosuthu Buthelezi in 1991 prepared the ground for negotiating the transition to democracy. A key element of this Accord was that, for the first time, it was recognised that 'the perception of the past role of the police has engendered suspicion and distrust between the police and many of the affected communities' and that the police should 'endeavour to protect the people of South Africa from all criminal acts and shall to do so in a rigorously non-partisan fashion, regardless of the political belief and affiliation, race, religion, gender or ethnic origin of the perpetrators or victims of such acts.' The text of the National Peace Accord is reprinted in Peter Gastrow. (1996). *Bargaining For Peace: South Africa and the National Peace Accord*, 113. The book also provides a useful overview of its history and impact on South Africa's negotiated transition.
  - 207 See Richard Abel. (1995). *Politics By Other Means*, especially 173-210, for a description of the civil war in Natal.
  - 208 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 22.
  - 209 Clifford Shearing. (1994). Remaking the South African Police. In Paseka Ncholo (Ed.), *Towards Democratic Policing*.
  - 210 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 27.

- 211 George Fivaz. (1996). *Status report: Transformation of the South African Police Service*, 5-6.
- 212 The South African Police Service was officially established under South Africa's Interim Constitution, which came into effect on 27 April 2004. Until the South African Police Service Act was finally promulgated in 1995, the police operated under a series of proclamations. An interim constitution was negotiated before the first democratic elections, containing a number of key constitutional principles, to which the final constitution, drafted by the Constitutional Assembly had to adhere.
- 213 This included, for example, standardising service conditions, such as salaries and benefits, and the creation of a unified pension scheme and medical aid. Recruitment, promotion, retention, and disciplinary policies were similarly standardised. All forms and registers were standardised, loss control and logistics systems were integrated and an audit done of all assets—particularly arms and ammunition. Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Janine Rauch & Elrena van der Spuy (Eds.), *Police Reform in Post-Conflict Africa: A Review*. Cape Town, 49.
- 214 Those who could not be accommodated were allowed to take early retirement packages. Certain promotion requirements were waived for those who had been disadvantaged by the previous system, and pension packages provided for those recruited at a later age. Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Janine Rauch & Elrena van der Spuy (Eds.), *Police Reform in Post-Conflict Africa: A Review*.
- 215 See Ted Leggett. (2002). Everyone's an Inspector: The Crisis of Rank Inflation and the Decline of Visible Policing. *SA Crime Quarterly*, 1, 6, for a discussion of the impact that this period had on the structure of the police. The amalgamation of SAPS already fundamentally changed its profile, with 64 per cent of the Service being black and 36 per cent white after integration. Janine Rauch. (2001). Police Reform and South Africa's Transition, Crime and Policing in Transitional Societies. *South African Institute of International Affairs Seminar Report*, 8, 119, 122. The apartheid police force was overwhelmingly white and male, senior management entirely so. Cawthra records that in mid-1991, of the 108000 police members, 49000 were African, 47000 white, 8500 coloured, and 3500 Indian. He notes that whites made up 94.6 per cent of the officers; of the 4000 officers, only 82 were black Africans. Women made up just over 5 per cent of the force. Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 21. Changing the face of the police was therefore a critical priority. The resultant initiatives aimed at redressing the position of those who had been 'historically disadvantaged' included: allocating 40 per cent of in-service training places and 70 per cent of Emerging Leader Programme places for women; adopting a fast-track promotion policy to improve race and gender representivity; adopting a Code of Good Practice for people with disabilities; developing a programme to enhance representivity in specialised units; establishment of a National Gender Desk and Gender Structures 'to identify and institute

corrective action pertaining to gender inequality in the Police Service'; removal of all discriminatory content from policies and procedural documents; and adoption of a 'zero tolerance' approach to members found guilty of racism or unfair discrimination.

- Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Janine Rauch & Elrena van der Spuy (Eds.), *Police Reform in Post-Conflict Africa: A Review*, 54.
- 216 South African Police Service. (2013). *Annual Report 2012/13*, 12. In the Western Cape the ratio is 1:299. The SAPS provides a table of comparisons to other countries, reflecting a current ratio of 1:392 in the United States. The source is not indicated, nor are differences between states. Graeme Newman reports a ratio of 1:300 in Graeme R. Newman. (1999). *Global Report On Crime And Justice* New York; Ted Leggett. (2003). What do the police do? Performance measurement and the SAPS. *Institute for Security Studies Paper*, 66, 6.
- 217 Ted Leggett. (2003). What do the police do? Performance measurement and the SAPS. *Institute for Security Studies Paper*, 66, 6. At the time that Leggett was writing the proportion of detectives was 18 per cent. The SALC reported that only 10 per cent of those working as detectives were trained as detectives. South African Law Commission. (2002). *Final Report on Project 107: Sexual Offences*, 3.2.6.1, n18.
- 218 Ted Leggett. (2002). Everyone's an Inspector: The Crisis of Rank Inflation and the Decline of Visible Policing. *SA Crime Quarterly* 1, 6.
- 219 Martin Schönteich. (2003). A bleak outlook: HIV/AIDS and the South African Police Service. *SA Crime Quarterly*, 5, 1.
- 220 Ted Leggett. (2002). Everyone's an Inspector: The Crisis of Rank Inflation and the Decline of Visible Policing. *SA Crime Quarterly* 1, 23.
- 221 Transcripts of evidence led before the Commission and its final report are available at <<http://www.khayelitshacommission.org.za>>.
- 222 The entire basic training curriculum was revised. It currently consists of 24 months, comprising six months of basic training, six months as a student constable in uniform (three of which are inside the community service centre and three outside), and twelve months of in-service training. Detectives receive a further three months of specialised training. AfriMAP (2005). *South Africa, Justice Sector and the Rule of Law*, 111.
- 223 Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Janine Rauch & Elrena van der Spuy (Eds.), *Police Reform in Post-Conflict Africa: A Review*, 52.
- 224 While a number of South African police researchers were involved in the development of community policing models in South Africa, most of the technical assistance in this regard came from the Belgian Gendarmerie, the Canadian Police, the Dutch Police Study Centre and the Danish Police School—none of them countries that share anything like the challenges posed by the South African context. Eric Pelser suggests that the popularity of 'community policing' results from 'the flexibility or definitional vagueness of the concept itself'. Eric Pelser. (2000). An Overview

- of Community Policing in South Africa in Policy Guidance on Support to Policing in South Africa. In Ian Clegg, Robert Hunt & Jim Whetton (Eds.), *Policy Guidance on Support to Policing in Developing Countries*, 103. Also see Mike Brogden & Clifford Shearing. (1993). *Policing for a New South Africa*; Elrena van der Spuy. (1995). The Secret to Successful Policing? *Crime & Conflict*, 3.
- 225 Largely derived from developed country responses to poor relations between the police and high-crime minority urban communities, community policing was designed to increase police receptiveness to community demands and priorities. In this way the police, as an institution, would gain renewed legitimacy. According to Chicago law professor Tracey Meares, a strong supporter of community policing, this model 'embraces the decentralisation of command' and 'celebrates the discretion of street-level officers', who respond to community designated concerns. Tracy L. Meares. (2002). Praying for Community Policing. *California Law Review*, 90 1593, 1598. Thus community policing is based on the idea of policing by consent—with the police deriving their legitimacy from the approval and support of the community, whom they serve. AfriMAP similarly describes community police forums in South Africa as 'an attempt to build community trust in South Africa's historically illegitimate police service.' AfriMAP. (2005). *South Africa, Justice Sector and the Rule of Law*, 109.
- 226 Louis Eloff. (2006). Transformation of the SAPS: An Insider's View. In Janine Rauch & Elrena van der Spuy (Eds.), *Police Reform in Post-Conflict Africa: A Review*, 53.
- 227 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 32.
- 228 Janine Rauch. (2001). Police Reform and South Africa's Transition, Crime and Policing in Transitional Societies. *South African Institute of International Affairs Seminar Report 8*, 119.
- 229 Gavin Cawthra. (1992). *South Africa's Police: From Police State to Democratic Policing*, 13.
- 230 The poor have less capacity to absorb the effects of property crimes and poverty increases vulnerability to crimes of violence, like rape. Shaw & Louw point to factors such as the need to walk long distances, absence of telephones and roads, weak protection measures, and uneven allocation of police, as factors exacerbating this vulnerability. Unlike their wealthier counterparts they are unable to buy private security. Mark Shaw & Antoinette Louw. (1998). Stolen opportunities: The impact of crime on South Africa's poor. *ISS Monograph Series*, 14, 12.
- 231 Rachel H. Pain. (1997). Social Geographies of Women's Fear of Crime. *Transactions of the Institute of British Geographers, New Series*, 22(2), 231, 234. As Pain reflects, 'the fear of sexual violence affects all women but ... those with advantages of class, income and education are able to bypass its harmful effects on lifestyle more easily.' (at 238, internal references omitted).

- 232 Richard T. Ford. (2001). Political Geography in Legal Analysis. In Nicholas Blomley, David Delaney & Richard T. Ford (Eds.), *The Legal Geographies Reader: Law, Power and Space*, 88.
- 233 Statistics South Africa. (2014). Quarterly Labour Force Survey, *Quarter 1*, xvii.
- 234 53.2 per cent per cent of South Africans under the age of 25 are unemployed, as are 29.5 per cent in the 25-35 age group. Statistics South Africa. (2014). Quarterly Labour Force Survey, *Quarter 1*, 6.
- 235 Geeta Kingdon & John Knight. (2002). What Have We Learnt About Unemployment From Microdatasets in South Africa? *Social Dynamics*, 27, 2002. Kingdon & Knight describe unemployment rates among Africans in South Africa as 'catastrophically high' (at 13).
- 236 Steve Mokwena. (1991). 'The era of the jackrollers: Contextualising the rise of youth gangs in Soweto' Seminar No. 7.
- 237 A recent South African Arrestee Study conducted in three metropolitan areas found that 44 per cent of men arrested for rape and attempted rape in those jurisdictions tested positive on urine analysis for marijuana and mandrax. Andreas Plüddemann, Charles Parry, Antoinette Louw & Patrick Burton. (2000). Perspectives on demand: results of the 3-metros arrestee study. In Ted Leggett (Ed.), *Drugs & Crime in South Africa*. This might be a further explanation for the extremely brutal nature of these attacks, as well as the prevalence of penetration with objects other than the penis—physiologically many of these men will not be able to sustain an erection. Lloyd Vogelmann. (1990). *The Sexual Face of Violence: Rapists on Rape*.
- 238 Swart et al found that 31 per cent of the rapes in their sample had been committed in open fields. Lu-Anne Swart, Angela Gilchrist, Alex Butchart, Mohamed Seedat & Lorna Martin. (2000). Rape surveillance through district surgeon offices in Johannesburg, 1996-1998: Findings, evaluation and prevention implications. *South African Journal of Psychology*, 30(2), 1.
- 239 According to the 2011 Census, the Western Cape Province is home to 5.3m people. Statistics South Africa. (2012). Census 2011. Census data is available at <www.statssa.gov.za>.
- 240 Statistics South Africa. (2012). Census 2011.
- 241 Under the Group Areas Act 41 of 1950.
- 242 Two percent of Ocean View's residents are characterised as 'Black African', 0.24 per cent as Indian/Asian and 0.19 per cent as white. Almost 70 per cent of the Ocean View community speaks Afrikaans and 30 per cent English. Statistics South Africa. (2012). Census 2011.
- 243 Meaning 'let us build together'. Both Redhill and Masiphumelele are classified by the City of Cape Town's Socio-Economic Status Index as one of the worst 20 per cent of suburbs in the City. Indicators used in this regard are the percentage of households earning less than R19,200 per annum (calculated to be the basic household subsistence level for Cape Town), the percentage of adults aged 20 and over with less than a matric qualification, the percentage of economically active persons unemployed, and the percentage of the labor force working in elementary and unskilled professions. Phillip Romanovsky & Janet Gie. (2006). *The Spatial Distri-*

*bution of Socio-Economic Status, Service Levels and Levels of Living in the City of Cape Town 2001.*

- 244 Africans from outside South Africa make up approximately 5 per cent of the Masiphumelele population. They have been subject to repeated incidents of xenophobic attacks, reaching such levels in 2006 and again in 2008 that all foreigners were forced to flee the township under threat of death. Much has been written about the 2008 attacks, which displaced more than 50,000 people. The following articles are illustrative: Sumayya Ismail, *Somalis live in fear in South Africa*, Mail & Guardian, October 3, 2006; Helen Bamford, *Refugees Fear More Attacks and Looting*, Saturday Argus, October 18, 2008. For further data and analysis see the University of the Witwatersrand's Forced Studies Migration Project at <www.migration.org.za>.
- 245 Population densities are calculated by the City of Cape Town's Department of Strategic Information based on census data. Suburbs reflected in their population density analysis do not, however, map neatly onto the publicly available census data. Data is available at <http://www.capetown.gov.za/en/stats>.
- 246 Forty six percent of the total population in Masiphumelele is aged between 18-34 years.
- 247 Those who are employed are clustered in what Statistics South Africa calls 'elementary occupations' (32.42 per cent), the trades (18.7 per cent), clerical work (13.04 per cent) and the service industry (11.55 per cent).
- 248 Phillip Romanovsky & Janet Gie. (2006). *The Spatial Distribution of Socio-Economic Status, Service Levels and Levels of Living in the City of Cape Town 2001*
- 249 University of Stellenbosch Unit for Religion and Development Research. (2005), 19. The Stellenbosch study included all areas covered by the current study, excluding Muizenberg, Vrygrond and Seawinds.
- 250 Sarah Shelmerdine. (2006). Relationships between Adolescents and Adults: The Significance of Narrative and Context. *Social Dynamics*, 32(1), 169.
- 251 City of Cape Town. (2002). *City Statistics and Population Census: Sub-council, Ward and Suburb Profiles*. Available at <www.captown.gov.za/en/stats/2001census>. Data disaggregated and re-analysed by the writer.
- 252 Twenty two percent (22 per cent) have a pit latrine without ventilation, literally a hole in the ground covered with a corrugated iron structure to keep the weather out.
- 253 Phillip Romanovsky & Janet Gie. (2006). *The Spatial Distribution of Socio-Economic Status, Service Levels and Levels of Living in the City of Cape Town 2001*.
- 254 Gross densities are calculated by the City of Cape Town. These differences are glossed in the publicly available census statistics, but apparent in the more nuanced statistics used by the City of Cape Town. Available at <http://www.capetown.gov.za/en/stats/1996census/Documents/SP\_Gross\_Densities.htm>.

# ENDNOTES

- 255 Adrian Frith. (2012). Geographical areas calculated from the Census 2011 GIS DVD and Census 2011 Community Profile Databases. Retrieved from <<http://census2011.adrianfrith.com/place/577023>>, accessed June 2014.
- 256 All data in this section is taken from Statistics South Africa. (2012). Census 2011.
- 257 <<http://www.zulu.org.za/index.php?cityhome+3591>>, accessed June 2014.
- 258 <<http://www.sahistory.org.za/place/weneen>>, accessed June 2014.
- 259 <<http://www.kzncogta.gov.za/>>, accessed June 2014.
- 260 Statistics South Africa. (2012). Census 2011.
- 261 Statistics South Africa. (2012). Census 2011.
- 262 Statistics South Africa. (2012). Census 2011.
- 263 <<http://www.mdukatshani.com/resources/>>, accessed June 2014.
- 264 Statistics South Africa. (2012). Census 2011.
- 265 Statistics South Africa. (2012). Census 2011.
- 266 Statistics South Africa. (2012). Census 2011.
- 267 Human Sciences Research Council. (2002). *The Impact of HIV/AIDS on Land Issues in KwaZulu-Natal Province, South Africa: Case studies from Mudén, Dondotha, Kwadumisa and Kwanyuswa*, 20.
- 268 Statistics South Africa. (2012). Census 2011.
- 269 Human Sciences Research Council. (2002). *The Impact of HIV/AIDS on Land Issues in KwaZulu-Natal Province, South Africa: Case studies from Mudén, Dondotha, Kwadumisa and Kwanyuswa*, 21.
- 270 Human Sciences Research Council. (2002). *The Impact of HIV/AIDS on Land Issues in KwaZulu-Natal Province, South Africa: Case studies from Mudén, Dondotha, Kwadumisa and Kwanyuswa*, 21.
- 271 For examples of land and service delivery protests in 2013, see <[http://www.witness.co.za/index.php?showcontent&global\[\\_id\]=112932](http://www.witness.co.za/index.php?showcontent&global[_id]=112932)>, accessed January 2014.
- 272 Statistics South Africa. (2012). Census 2011.
- 273 Elisabeth M. Iglesias. (1996). Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality. *Vanderbilt Law Review*, 49, 868, 877.

## 274 Age of complainants

Western Cape		KwaZulu-Natal	
<12	14	<12	11
12-16	25	12-15	12
17-24	38	16-18	14
25-35	39	19-29	18
36-45	11	30-39	2
46-96	4	40-49	2
		50-59	1



- 275 The 40 per cent of victims who claim to be unemployed tallies almost exactly with the 40 per cent unemployment rate in South Africa. This figure is calculated on a broad definition of unemployment. Geeta Kingdon & John Knight. (2004). Unemployment in South Africa: The Nature of the Beast. *World Development*, 32(3), 391.
- 276 Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293).
- 277 Jeanne Gregory & Sue Lees. (1999). *Policing Sexual Assault* (expressing concern about British Home Office studies that include relatives, friends and work colleagues in the category of 'intimate'). Kerstetter, for example, defines his acquaintance variable as 'an extensive category that includes acquaintanceships from slight to intimate. Thus it includes incidents in which the complainant and the alleged assailant had just met in a bar as well as those in which they had a much more extensive history, even a history of sexual intimacy.' Critically: 'It includes all cases in which there exists enough indication of complainant consent to the relationship to allow the logical possibility of consent to the sexual act.' Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267, 287 fn 78. It is, of course, exactly this 'logical possibility' that is so steeped in stereotype.
- 278 Grace et al, for example, treat 'acquaintances' as including men whom the victim had met in the preceding 24 hours (50 per cent of the 'acquaintance' category), while 'intimates' included work colleagues and friends. Sharon Grace, Charles Lloyd & Lorna J.F. Smith. (1992). *Rape: From Recording to Conviction* (Research and Planning Unit Paper 71).
- 279 Susan Estrich. (1986). Rape. *Yale Law Journal*, 95(6), 1087, 1179.
- 280 Frazier and Haney point out that, for example, a victim is not likely to be financially or emotionally dependant on a perpetrator that they have just met. Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607, 617.
- 281 **Relationship of the accused to the complainant**

	Western Cape	KwaZulu-Natal
Husband	4	–
Boyfriend	6	3
Ex-husband or boyfriend	19	6
Family	13	6
Friend	13	3
Neighbour	1	6
Acquaintance	29	16
Known by sight	16	2
Stranger	31	20



**282 Age of the accused**

Western Cape		Kwa-Zulu Natal	
<12	1	<12	3
12-16	8	12-15	1
17-25	21	16-18	7
26-35	25	19-29	28
36-45	19	30-39	6
46-55	7	40-49	4
		50-59	1

283 Robbery, which is a crime of violence, was included with theft in a category called 'property-related crimes'. Unfortunately it is not possible to disaggregate this category and, as a result, robbery is therefore excluded from the analysis of interpersonal crimes.

284 Lillian Artz & Dee Smythe. (2006). Rape and Sexual Assault. In Sean Kaliski (Ed.), *Oxford Handbook of Psycho-Legal Assessment*.

**285 Number of perpetrators per rape case**

	Western Cape	KwaZulu-Natal
1	103	48
2	12	6
3	8	2
4	7	1
5	1	-
6	-	2

286 In only two cases, both from Muizenberg, was there an indication that a weapon had been seized. The Firearms Control Act 60 of 2000 makes provision in section 102 for a person to be declared unfit to possess a firearm if they have threatened to kill or injure themselves or another person by means of a firearm or other dangerous weapon. Dee Smythe. (2004). Missed Opportunities: Confiscation of Weapons in Domestic Violence Cases. *SA Crime Quarterly*, 10, 19. Smythe argues that such applications should be made routinely in domestic violence cases, and discusses the meaning of 'dangerous weapon'.

287 Janice Du Mont, Karen-Lee Miller & Terri L. Myhr. (2003). The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women. *Violence Against Women*, 9(4), 466: 'Women who sustained bruises, lacerations, abrasions, bumps, internal injuries, and/or fractures were approximately three and a half times more likely to contact the police than those who were not clinically injured'; Alan J. Lizotte. (1985). The Uniqueness of Rape: Reporting Assaultive Violence to the Police.

*Journal of Research in Crime & Delinquency*, 31, 169. Ronet Bachman & Raymond Paternoster. (1993). A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come? *Journal of Criminal Law & Criminology*, 84, 3; Ronet Bachman. (1998). The Factors Related to Rape Reporting Behavior and Arrest. New Evidence from the National Crime Victimization Survey. *Criminal Justice and Behavior*, 25, 8; Shirley Feldman-Summers & Gayle C. Norris. (1984). Rape As Viewed By Judges, Prosecutors, and Police Officers. *Criminal Justice and Behavior*, 7(1), 19; Susan Estrich. (1987). *Real Rape: How the Legal System Victimises Women Who Say No*; Sharon Grace, Charles Lloyd & Lorna JF Smith. (1992). *Rape: From Recording to Conviction* (Research and Planning Unit Paper 71).

- 288 I am grateful to Claudine Hennessey RN, BScN, BFA for providing me with this glossary of terms and patiently explaining their meaning.
- 289 Only two J88 medico-legal reports referenced HIV. In one case it was reported that a rapid test had been administered and the patient had tested positive. In another it was indicated that the patient was known to be HIV positive.

290 **Where the rape occurred**

	Western Cape	KwaZulu-Natal
Suspect's home	40	24
Victim's home	19	5
Shared home	11	4
Public open space	46	22
Public building	10	2
Friend's home	7	1
Perpetrator's car	4	1
Victim's car	1	-
Unknown	4	3

- 291 Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267; Vicki M. Rose & Susan C. Randall. (1982). The Impact of Investigator Perceptions of Victim Legitimacy on the Processing of Rape/Sexual Assault Cases. *Symbolic Interaction*, 5, 23 (providing a useful overview of studies). Buddie and Miller summarise the findings of various studies as illustrating that a rape victim is blamed more when she has previous sexual experience, delays resisting the attack, or is raped by a man known to her. Amy M. Buddie & Arthur G. Miller. (2001). Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims. *Sex Roles*, 45(3/4), 139.
- 292 Regina A. Schuller & Anna Stewart. (2000). Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication.

- Law & Human Behaviour*, 24, 535; Antonia Abbey & Richard J. Harnish. (1995). Perception of Sexual Intent: The Role of Gender, Alcohol Consumption, and Rape Supportive Attitudes. *Sex Roles*, 32, 297.
- 293 Georgina S. Hammock & Deborah R. Richardson. (1997). Perceptions of Rape: The Influence of Closeness of Relationship, Intoxication and Sex of Participant. *Violence and Victims*, 12, 237; Ann-Marie Wall & Regina A. Schuller. (2000). Sexual Assault and Defendant/Victim Intoxication: Jurors Perceptions of Guilt. *Journal of Applied Social Psychology*, 30, 253.
- 294 Denise Lievore. (2004). Victim Credibility in Adult Sexual Assault Cases, Trends & Issues in Crime and Criminal Justice. *Trends & Issues in Crime and Criminal Justice*, 288, 1, 6 (drawing a distinction between 'legal credibility' and 'everyday understandings of victim credibility').
- 295 CIAC Monitor. (2002). *Analysis: Rape and Attempted Rape Statistics as of June 2001*, 35.
- 296 CIAC Monitor. (2002). *Analysis: Rape and Attempted Rape Statistics as of June 2001*. Duxita Mistry, Rika Snyman & Marielize van Zyl. (2001). *Social Fabric Crime in the Northern Cape*, 35. Referencing the 1998 CIMC report, which found 'a remarkably high correlation between the abuse of alcohol and the incidence of rape and may indicate that the distribution of rape could to some extent be linked to areas afflicted by substance abuse' (original report unavailable). CIMC Report. (1998). The Incidence of Serious Crime: January to June 1998. *Quarterly Report*, 3, 57.
- 297 Thirty three of the 42 cases in which the suspect's alcohol or drug use was documented, including eleven of the twelve cases involving drugs, were from one precinct. This may mean first that drug and alcohol use is more prevalent in that policing jurisdiction, secondly that detectives there are more attuned to these issues and ask the necessary questions, thirdly that it is considered irrelevant at other police stations, or, that recording practices are better in this regard at that station.
- 298 Three complainant withdrawal statements indicated that the complainant was 'too drunk to know what happened'. Complainants could not point out the crime scene or identify the perpetrator(s), and could not recall whether they may have consented. One complainant had been seen drinking before she was brutally assaulted, raped and left for dead in an oil drum behind the house where she was found, naked and covered in blood. The photographs in the docket showed multiple stab wounds on her body, including her face, where even her eyelids had been slit. She had absolutely no recollection of what had happened. In other cases there is nothing more than an assumption of alcohol use by the complainant. One detective writes: 'while I was talking to her I sensed that she was under the influence of alcohol'.
- 299 Jan Jordan. (2004). *The Word of A Woman? Police, Rape & Belief*. Jennifer M. Brown, Carys Hamilton & Darragh O'Neill. (2007). Characteristics Associated With Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors. *Psychology, Crime & Law*, 13, 4. Brown et al also found a correlation between someone other

than the victim reporting the rape and the case being discontinued prior to the prosecution stage.

300 **Person reporting the rape to the police**

	Western Cape	KwaZulu-Natal
Victim	106	44
Mother	9	8
Other family	9	5
Friend	4	–
Health Professional	2	2
Community Member	2	1
Teacher	–	1

- 301 Burchell and Milton set out the criteria for admissibility as follows: '... the complaint should have been made without undue delay, at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complainant could reasonably be expected to make it' (citing *R v C* 1955 (4) SA 40 (N)). Jonathan Burchell & John Milton. (1997). *Principles of criminal law* (2nd ed.), 499.
- 302 Jennifer Temkin. (2002). *Rape and the Legal Process* (2nd ed.), 145. SORMA specifically enjoins against negative inferences drawn from a delay in reporting.
- 303 Kelly argues that '[u]nsurprisingly the cases least likely to be considered false reports are those which are close to the real rape template'. Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 22.
- 304 Joanne Belknap. (2001). *The Invisible Woman: Gender, Crime and Justice* (2nd ed.), 216.
- 305 The South African Police Service Crime Information Analysis Centre report recommends, for example, that '[p]olice ... , despite heavy workloads need to carefully consider the merits of each case in order to detect irregularities'; see South African Police Service Crime Information Analysis Centre. (nd). *Docket Analysis: Selected Areas: RSA Rape Cases Disposed of as Withdrawn*, 7.
- 306 Susan Estrich. (1987). *Real Rape: How the Legal System Victimises Women Who Say No*; Zsuzsanna Adler. (1987). *Rape on Trial*; Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*; Gary La Free. (1980). Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing. *Social Forces*, 58(3), 833, 848.
- 307 In the case of *S v Lotter* 2008 (2) SACR 595 (C) at 7, for example, the court opined that '[t]he rape alleged by the complainant was not ... accompanied by violence or threat. It was a matter of the appellant urging his attention on the complainant with such persistence that in the end she capitulated.'

- 308 Liz Kelly, has shown through detailed and extensive empirical work that the 'real rape template' still has substantial traction. Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293). Also Megan A. Alderden & Sarah E. Ullman. (2012). Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases. *Violence Against Women* 18, 525; Shane Muldoon, S. Caroline Taylor & Caroline Norma. (2013). Patterned Characteristics and Discontinued Sexual Assault Complaints in the Criminal Justice Process. *Current Issues in Criminal Justice*, 24(3), 395; Kathleen Daly & Brigitte Bouhours. (2010). Rape and attrition in the legal process: a comparative analysis of five countries. *Crime and Justice* 39, 565.
- 309 Simon Ekstrom notes of his analysis of rape dockets registered in Stockholm between 1946 and 1950: 'The question of whether the alleged crime was considered possible to prove was dependent upon who reported whom for what. For the complainants it was a matter of qualifying for inclusion within the protection of the law. But what appeared as a rejection of someone's credibility, was in actual fact a result of a prior rejection of the individual's person and character. From the point of view of the legal system, some individuals were more fitted than others for the role of credible victim or likely offender. The sexually immoral woman and the man at the mercy of his sexuality were both in danger of having their credibility questioned: the former a poor victim and the latter all too suitable an offender.' Simon Ekstrom. (2003). Qualification and Disqualification in Rape Cases. *Journal of Scandinavian Studies in Criminology & Crime Prevention*, 4, 204.
- 310 Statistics Canada. (1993). *The Violence Against Women Survey: Survey Highlights*. See also Mary Koss, Christine A. Gidycz & Nadine Wisniewski. (1987). The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students. *Journal of Consulting and Clinical Psychology*, 55(2), 162; Joel Epstein & Stacia Langenbahn. (1994). *The Criminal Justice and Community Response to Rape* (National Institute of Justice Series, Issues and Practices in Criminal Justice); Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*; Linda L. Holmstrom & Ann W. Burgess. (1978). *The Victim of Rape: Institutional Reactions*. Methodologically, it would require surveying or otherwise interviewing victims. Most studies suggest that those victims who have had the worst experiences with the police are often the most reluctant to participate in such studies. See, for example, Jennifer Temkin. (1999). Reporting Rape in London: A Qualitative Study. *Howard Journal of Criminal Justice*, 38, 17, 18.
- 311 In Amanda Gouws. (2005). *Unthinking Citizenship: Feminist Debates in Contemporary South Africa*, 254.
- 312 *South African Leader Disputes Official Statistics*, U. N. Wire, November 2, 1999, available at <[http://www.unwire.org/unwire/19991102/5609\\_story](http://www.unwire.org/unwire/19991102/5609_story).

- asp>. (Then President Thabo Mbeki is reported to have 'slammed' the police for releasing 'purely speculative' rape statistics).
- 313 Statistics South Africa. (1998). *Victims of Crime Survey*.
- 314 This is a methodological shortcoming recognised by Statistics South Africa itself. See Statistics South Africa. (2000). *Quantitative Research Findings on Rape in South Africa*.
- 315 Neil Andersson, Sharmila Mhatre, Nzwakie Mqotsi & Marina Penderis. (1998). *Prevention of Sexual Violence: A Social Audit of the Role of the Police in the Jurisdiction of Johannesburg's Southern Metropolitan Local Council*.
- 316 Deborah Budlender, Ntebaleng Chobokoane & Sandile Simelane. (2004). Marriage patterns in South Africa: Methodological and substantive issues. *Southern African Journal of Demography*, 9(1), 1 describing, at 6, how people who are co-habiting may report to enumerators that they are 'married' because it is more socially appropriate.
- 317 Medical Research Council & Department of Health (South Africa). (1999). *South Africa Demographic and Health Survey*; Rachel Jewkes, Loveday Penn-Kekana, Jonathan Levin, Matsie Ratsaka & Margaret Schriber. (1999). 'He must give me money he mustn't beat me'. *Violence against women in three South African Provinces: Medical Research Council Technical Report*. As Shaw & Gastrow point out, South Africans are particularly skeptical of official crime statistics given the pervasive fear (and rhetoric) of crime and criminality; see Mark Shaw & Peter Gastrow. (2001). Stealing the Show? Crime and its Impact in Post-Apartheid South Africa. *Daedalus*, 130(1), 235, 237. The government-imposed moratorium on the release of crime statistics in 1998, based on their assertions that these statistics were sometimes incorrect and often incorrectly interpreted, simply added to the popular perception that the South African government was hiding the true extent of criminal victimisation. Mark Shaw. (1998). Of Crime and Country: Reported Crime Trends in South Africa and Future Scenarios. *SA Crime Quarterly*, 2, 3; Department of Safety and Security (South Africa). (1998). *Report of the Orkin Committee of Enquiry into Crime Statistics*.
- 318 More information on this campaign is available at <<http://www.oneinnine.org.za>>.
- 319 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 10; Jan Jordan. (2001). World's Apart? Women, Rape and the Police Reporting Process. *British Journal of Criminology*, 41, 679, 686: 'One-third of the women simply said: 'I felt I should', almost a further third (30 percent) said to 'protect others'; more than a quarter (26 percent) said 'they didn't want him getting away with it'; and almost a quarter (22 percent) said they reported the rape because they were scared of a repeat attack.'
- 320 Shirley Feldman-Summers & Gayle C. Palmer. (1980). Rape As Viewed By Judges, Prosecutors, and Police Officers. *Criminal Justice and Behavior*,

- 7(1), 19; Janice Du Mont, Karen-Lee Miller & Terri L. Myhr. (2003). The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women. *Violence Against Women*, 9(4), 466; Rita Gunn & Rick Linden. (1997). The Impact of Law Reform on the Processing of Sexual Assault Cases. *Canadian Review of Sociology & Anthropology*, 34, 155.
- 321 Janice Du Mont, Karen-Lee Miller & Terri L. Myhr. (2003). The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women. *Violence Against Women*, 9(4), 466, 477.
- 322 Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607; Martin S. Greenberg & R. Barry Ruback. (1992). *After the Crime: Victim Decision Making*; R. Barry Ruback. (1993). Comment on Bachman. The victim-offender relationship does affect victims' decisions to report sexual assaults. *Criminal Justice and Behavior*, 20, 271.
- 323 For example, Ronet Bachman. (1993). Predicting the Reporting of Rape Victimization: Have Rape Reforms Made a Difference? *Criminal Justice and Behavior*, 20, 254; Ronet Bachman. (1998). The Factors Related to Rape Reporting Behavior and Arrest. New Evidence from the National Crime Victimization Survey. *Criminal Justice and Behavior*, 25, 8; Diane E. Russell. (1984). *Sexual Exploitation: Rape, Child Abuse and Workplace Harassment*.
- 324 Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293), 18.
- 325 For example, Rita Gunn & Candice Minch. (1998). *Sexual Assault: The Dilemma of Disclosure, The Question of Conviction*; Mary W. Stewart, Shirley A. Dobbin & Sophia I. Gatowski. (1996). 'Real Rapes' and 'Real Victims': The Shared Reliance on Common Cultural Definitions of Rape. *Feminist Legal Studies*, 4, 159. Peterson & Muehlenhard, at 140, deal with the ambivalence of victim questions concerning 'was it sex or rape?' based on the fact that there was no penile penetration—only digital, the brevity of the encounter, and a lack of strong emotional reaction/trauma; see Zoe D. Peterson & Charlene L. Muehlenhard. (2004). Was It Rape? The Function of Women's Rape Myth Acceptance and Definitions in Labeling their Own Experiences. *Sex Roles*, 51(3/4), 129. Also Nicola Gavey. (1999). 'It wasn't rape, but ...': Revisiting Definitional Problems in Sexual Victimization. In Sharon Lamb (Ed.), *New Versions of Victims: Feminists Struggles with the Concept*.
- 326 Ronet Bachman. (1993). Predicting the Reporting of Rape Victimization: Have Rape Reforms Made a Difference? *Criminal Justice and Behavior*, 20, 254; Ronet Bachman. (1998). The Factors Related to Rape Reporting Behavior and Arrest. New Evidence from the National Crime Victimization Survey. *Criminal Justice and Behavior*, 25, 8; Shirley



- Feldman-Summers & Gayle C. Palmer. (1980). Rape As Viewed By Judges, Prosecutors, and Police Officers. *Criminal Justice and Behavior*, 7(1), 19; Jacqueline Golding, Judith M. Siege, Susan B. Sorenson, M. Audrey Burnam & Judith A. Stein. (1989). Social Support Following Sexual Assault. *Journal of Community Psychology*, 17(1), 92; Helen A. Neville & Aalece O. Pugh. (1997). General and Culture Specific Factors Influencing African American Women's Reporting Patterns and Perceived Social Support Following Sexual Assault. *Violence Against Women* 3(4), 361. This was, for example, a key reason for not reporting, cited by 50 per cent of respondents in Statistics Canada's 1993 survey on violence against women; see Statistics Canada. (1993). *The Violence Against Women Survey: Catalogue No. 11-001E*.
- 327 Jennifer M. Brown, Carys Hamilton & Darragh O'Neill. (2007). Characteristics Associated With Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors. *Psychology, Crime & Law*, 13, 4, 14.
- 328 Studies have shown that victims' fears of further harm at the hands of the perpetrator, even where he is unknown to the victim, are a potent disincentive to reporting. Ronet Bachman. (1993). Predicting the Reporting of Rape Victimization: Have Rape Reforms Made a Difference? *Criminal Justice and Behavior*, 20, 254; See also Kate Gilmore & Lise Pittman. (1993). *To Report or Not to Report: A Study of Victims/Survivors of Sexual Assault and their Experience of Making an Initial Report to the Police*, 9: 'The very personal nature of the crime, the intimate and sexual explicitness of its detail, means the process of step by step description of the assault is, for the victim, invariably harrowing. The prospect of relaying such detail to anyone is daunting; how much more so when such detail must be relayed to uniformed and armed strangers as is the case when making a statement of formal complaint to the police.' Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607, 611.
- 329 Personal communication: Investigating Officer, Manenberg. Only five of the 132 case dockets examined for the Western Cape study made any reference to the gang affiliation or gang involvement of the alleged perpetrator, despite drawing from two areas with high levels of gang activity.
- 330 Judith Lewis Herman. (2005). Justice from a Victim's Perspective. *Violence Against Women*, 11, 571, 574.
- 331 Nicola Gavey. (1999). 'It wasn't rape, but ...': Revisiting Definitional Problems in Sexual Victimization. In Sharon Lamb (Ed.), *New Versions of Victims: Feminists Struggles with the Concept*.
- 332 Judith Lewis Herman. (2005). Justice from a Victim's Perspective. *Violence Against Women*, 11, 571, 572-3.
- 333 Gail Womersley & Anastasia Maw. (2009). Contextualising the Experiences of South African Women in The Immediate Aftermath of Rape. *Psychology in Society* 38, 40.



- 334 Reasons given included: that the rape happened in another province and the victim did not want to have to go back there; that the victim had experienced ongoing abuse which she had never reported or was an adult victim of child sexual abuse; that she 'thought she could handle it alone'; and that both the perpetrator and victim were foreign.
- 335 South African Police Service. (1998). *National Instruction 22/1998: Sexual offences: Support to victims and crucial aspects of the investigation*, section 9(2)(e).
- 336 Rayganah Barday & Helene Combrinck. (2002). *Implementation of Bail Legislation in Sexual Assault Cases: First Research Report 2000-2002*.
- 337 Lillian Artz, Dee Smythe & Ted Leggett. (2003). *Reflections on Integrated Rape Case Management*, 72.
- 338 'It is clear that when suspect threw her out of the car she had chance to take the number plate (REGISTRATION).'
- 339 Section 325.2.2.2.
- 340 National Instruction 3/2008: Sexual Offences. Government Gazette 31330, 15 August 2008, section 23(4).
- 341 As Kaufmann et al. point out, 'credibility of witnesses ... is often confused with questions regarding the reliability or accuracy of the testimony of the witness. It is important to keep these questions apart because there is strong evidence that the memories of trustworthy people are not necessarily correct.' Geir Kaufmann, Guri C. B. Drevland, Ellen Wessel, Geir Overskeid & Svein Magnussen. (2003). The Importance of Being Earnest: Displayed Emotions and Witness Credibility. *Applied Cognitive Psychology*, 17, 21.
- 342 Jonny Steinberg. (2008). *Thin Blue: The Unwritten Rules of Policing South Africa*, 58.
- 343 The investigation diary notes:  
'Complainant was contacted, she is not interested in this case any more, according her she is working and haven't got time to come and see me.'  
Seven months later the case was finally closed on the basis of a further withdrawal 'statement', also contained in the investigation diary:  
'Phoned victim. She confirmed that she is not interested in the case. They solved the matter with boyfriend. They also stay together and they also have a baby together.'
- 344 Under sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- 345 The rule applied historically to the testimony of rape complainants, single witnesses, accomplices and children. Although it has been expressly repealed in the case of rape victims (Act 32 of 2007) it continues to operate in respect of the other categories of witnesses. Per *R v Manda* 1951 (3) SA 158 (A) at 163D the testimony of child witness is treated in the same manner as that of accomplices, requiring corroboration to establish credibility. See also *Woji v Santam Insurance Company Ltd* 1981 (1) SA 1020 (A).

- 346 In South Africa, children are competent to testify if 'in the opinion of the court, they can understand what it means to tell the truth' (per Leonard H. Hoffman & David T. Zeffert. (1988). *The South African Law of Evidence* (4th ed.), 375.
- 347 Samantha Waterhouse. (2007). Submission to the NCOP on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill.
- 348 Section 170A.
- 349 Section 153.
- 350 Section 158.
- 351 *The Director of Public Prosecutions, Transvaal v the Minister of Justice and Constitutional Development and Others* [the Centre for Child Law; Childline South Africa, Resources aimed at the Prevention of Child Abuse and Neglect, Operation Bobbi Bear, Children First, People Opposing Women Abuse, and The Cape Mental Health Society as *amici curiae*] CCT 36/08 [2009] ZACC 8. (Rejecting the application to confirm the declarations of constitutional invalidity, with regards to the provisions described above, made by the court in *S v Mokoena*; *S v Phaswane* 2008 (2) SACR 216 (T). The Constitutional Court noted that the problem lay not with the sections per se, but with their overly narrow interpretation and implementation. Responding to concerns raised by civil society organisations, the court required the Department of Justice to furnish it with details of the number of intermediaries currently working in regional courts, the extent of staff shortages, the number of courts with CCTV facilities, and separate rooms from which children could testify, as well as steps being taken to remedy any shortcomings in this regard).
- 352 For which he had received a six-year sentence of which two years were suspended for five years. On appeal his sentence was reduced to twelve months. No further information is given.
- 353 Jonathon Goodfellow & Margaret Camilleri. (2003). *Beyond Belief, Beyond Justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice. Final report of Stage One of the Sexual Offences Project* (finding that mentally impaired women have less knowledge regarding sexually inappropriate behaviour and less knowledge about the law, as well as being at greater risk of sexual assault (at 44-46)). Anthony L. Pillay & Carol-Ann Sargent. (2000). Psycho-Legal Issues Affecting Rape Survivors with Mental Retardation. *South African Journal of Psychology*, 30(2), 9, 11. Beverly Dickman & Amanda Roux. (2005). Complainants with learning disabilities in sexual abuse cases: a 10-year review of a psycho-legal project in Cape Town, South Africa. *British Journal of Learning Disabilities*, 33, 138.
- 354 Pamela Cooke & Graham Davies. (2001) Achieving best evidence from witnesses with learning disabilities: new guidelines. *British Journal of Learning Disabilities*, 29, 84; Gill Green. (2001). Vulnerability of witnesses with learning disabilities: preparing to give evidence against a perpetrator of sexual abuse. *British Journal of Learning Disabilities*, 29(3), 103.

- Jonathon Goodfellow & Margaret Camilleri. (2003). *Beyond Belief, Beyond Justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice. Final report of Stage One of the Sexual Offences Project*, 52.
- 355 Finding: 'hymen not intact; brown vaginal discharge (smelly) possible STD'.
- 356 Duxita Mistry, Rika Snyman & Marielize van Zyl. (2001). *Social Fabric Crime in the Northern Cape*, 10 ('typically, the police invest human resources, time and money in an investigation, but the complainant then withdraws the case. This cycle is well known to the detectives and negatively influences their handling of these cases'); Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 15. Jacqueline Fitzgerald. (2006). The Attrition of Sexual Offences From the New South Wales Criminal Justice System. *Crime and Justice Bulletin*, 92, 1. Fitzgerald argues similarly that '[a] critical factor weakening many sexual offence cases is an unwillingness to proceed on the part of the victim'.
- 357 Duxita Mistry, Rika Snyman & Marielize van Zyl. (2001). *Social Fabric Crime in the Northern Cape*, 6.
- 358 See, e.g. Johan Schronen, 'Beaten' wife charged with perjury, Pretoria News, June 13, 2005 (reporting that Magistrate Susan Smith had ordered a woman who withdrew charges of rape against her partner, after an extended trial, to be charged with perjury); Staff Reporter, *Charge fake rape victims for HIV drug lies*, Pretoria News, August 28, 2003 (reporting that the provincial Minister for Health in the Northern Cape had said that 'Women who have unprotected sex then cry 'rape' to get free treatment against HIV and Aids infection should be prosecuted' . The Northern Cape Director of Public Prosecutions is quoted as saying: 'These women put the whole criminal justice system into disrepute. We have to account for cases not prosecuted successfully. The high number of rape charge withdrawals is a cause for concern.'
- 359 Gary La Free. (1981). Official Reactions to Social Problems: Police Decisions in Sexual Assault Cases. *Social Problems*, 28, 582, 588. La Free treats this as an 'instrumental' variable, defined as one of 'those factors either necessary to or facilitative of the administrative and legal processes that transform the statute into official action.' So, too, does Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267, 271.
- 360 Jessica Harris & Sharon Grace. (1999). *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (Home Office Research Study 196).
- 361 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 15.
- 362 Jessica Harris & Sharon Grace. (1999). *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (Home Office Research Study 196).
- 363 Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the

- Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607, 610.
- 364 Jenny Barga & Elaine Fishwick. (1995). *Sexual Assault Law Reform: A National Perspective*; Carol Withey. (2007). Female Rape—An Ongoing Concern: Strategies for Improving Reporting and Conviction Levels. *The Journal of Criminal Law*, 71(1), 54; Gerry Chambers & Ann Millar. (1987). Proving Sexual Assault: Prosecuting the Offender or Persecuting the Victim? In Pat Carlen & Anne Worrall (Eds.), *Gender, Crime and Justice*; Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*; Jessica Harris & Sharon Grace. (1999). *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (Home Office Research Study 196); Susan Lea, Ursula Lanvers & Steve Shaw. (2003). Attrition in rape cases: Developing a profile and identifying relevant factors. *British Journal of Criminology*, 43(3), 583; Jan Jordan. (2001). World's Apart? Women, Rape and the Police Reporting Process. *British Journal of Criminology*, 41, 679.
- 365 Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267, 293.
- 366 CIAC Monitor. (2002). *Analysis: Rape and Attempted Rape Statistics as of June 2001*. The study drew a random sample of withdrawn cases from those policing areas in South Africa with the highest rates of rape and attempted rape withdrawn during 1999 (comprising 16.2 per cent of withdrawn cases). Of those cases 89.7 per cent were rape cases.
- 367 Duxita Mistry, Rika Snyman & Marielize van Zyl. (2001). *Social Fabric Crime in the Northern Cape*, 41.
- 368 Duxita Mistry. (2000). The Dilemma of Case Withdrawal: Policing in the 'New' South Africa. In George Mair & Roger Tarling (Eds.), *The British Criminology Conference: Selected Proceedings 3. Papers from the British Society of Criminology Conference, Liverpool, July 1999*, 7.
- 369 Duxita Mistry. (2000). The Dilemma of Case Withdrawal: Policing in the 'New' South Africa. In George Mair & Roger Tarling (Eds.), *The British Criminology Conference: Selected Proceedings 3. Papers from the British Society of Criminology Conference, Liverpool, July 1999*, 11-18.
- 370 Section 325.2.1.1.
- 371 Section 325.2.1.2.
- 372 Compounding is defined as 'unlawfully and intentionally agreeing for reward not to prosecute a crime which is punishable otherwise than by a fine only'. Jonathan Burchell & John Milton. (1997). *Principles of criminal law* (2nd ed.), 710.
- 373 It is not known whether this withdrawal statement was used in respect of other offences. The language seems particularly relevant to interpersonal crimes.
- 374 Although the complainant did not suffer any injuries, she claimed in her statement that the accused had previously stabbed her, that she was

- afraid that he would do so again, and she had therefore not resisted when he threatened her with a knife.
- 375 R50 (fifty rand) is equal to approximately US\$4.16 at an exchange rate of R12 to US\$1 (March 2015). Charlene Smith, *Some 'reforms' need revisiting*, Mail & Guardian Online, December 4, 2003.
- 376 Helene Combrinck & Zukiswa Skepu. (2003). *Bail in sexual assault cases: victims' experiences. Second Research Report 2002-2003*, 25. R5,000 is the equivalent of approximately US\$ 420 as at March 2015.
- 377 Rachel H. Pain. (1997). Social Geographies of Women's Fear of Crime. *Transactions of the Institute of British Geographers, New Series*, 22(2), 231, 239, points out that violent incidents 'reported to the police ... are more likely to involve women who have no independent means of support and nowhere else to turn.'
- 378 Jonathan Burchell & John Milton. (1997). *Principles of Criminal Law* (2nd ed.), 710.
- 379 Section 325.2.1.2.
- 380 South Africa has the highest rate of intimate femicide in the world, with a woman killed by her intimate partner every six hours. Shanaaz Mathews, Naeemah Abrahams, Lorna Martin, Lisa Vetten, Lize van der Merwe & Rachel Jewkes. (2004). *Every six hours a woman is killed by her intimate partner: A National Study of Female Homicide in South Africa* (Medical Research Council Policy Brief No. 5).
- 381 Per section 17 of the Domestic Violence Act 116 of 1998.
- 382 Wayne Kerstetter. (1990). Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women. *Journal of Criminal Law & Criminology*, 81, 267, 309.
- 383 Denise Lievore. (2005). Prosecutorial Decisions in Adult Sexual Assault Cases. *Trends & Issues in Crime and Criminal Justice*, 291, 1, 6.
- 384 South African Police Service.(2008) *Annual Report 2007/8*, 112.
- 385 This suspicion continues to be articulated in discourses around women's claims of sexual victimisation. With reference to the use of South Africa's Domestic Violence Act, Parenzee et al. quote a police officer as saying:  
     This legislation does not always pan out as expected. Approximately 80 per cent of cases in this area are a misuse of the legislation. ... This is a major problem that I find here. That does not mean that I am against the law or condone domestic violence. In fact, I find domestic violence loathsome and know that the 20 per cent of cases really need this legislation because people, especially women, are being brutalised.  
 Penny Parenzee, Lillian Artz & Kelley Moulton. (2001). *Monitoring the Implementation of the Domestic Violence Act: First Report 2000-2001*, 88.
- 386 Ann W. Burgess. (1999). Public Beliefs and Attitudes towards Rape. In Robert R. Hazelwood & Ann W. Burgess (Eds.), *Practical Aspects of Rape Investigation: A Multidisciplinary Approach*; Eugene Kanin. (1994). False Rape Allegations. *Archives of Sexual Behavior*, 23(1), 81.

- 387 Camille E. LeGrand. (1973). Rape and Rape Laws: Sexism in Society and Law. *California Law Review*, 61(3), 919, 931 (internal references omitted): 'The false complaint is feared more in rape cases than in other crimes because of the basic assumptions that many women are either amoral or hostile to men and that women can induce rape convictions solely by virtue of fabricated reports'; Kirsten M. Williams. (1981). Few Convictions in Rape Cases: Empirical Evidence Concerning Some Alternative Explanations. *Journal of Criminal Justice*, 9, 29, 32. Antony Simpson. (1986). The 'Blackmail Myth' and the Prosecution of Rape and Its Attempt in 18th Century London: The Creation of a Legal Tradition. *Journal of Criminal Law & Criminology*, 77, 101, 106-09. The blackmail myth, according to Simpson (at 106), 'is the legal crystallisation of the assumption that the complainant in a rape prosecution is quite likely to have made her charge from motives corrupt, vindictive, or otherwise dishonest.' Nicola Gavey & Virginia Gow. (2001). 'Cry Wolf', Cried the Wolf: Constructing the Issue of False Rape Allegations in New Zealand Media Texts. *Feminism and Psychology*, 11(3), 341.
- 388 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 22, citing Lynn Jamieson, Michele Burman, Sue Grundy & Fiona Dyer. (1998). *The 'Attrition' of Sexual Offences in the Criminal Justice System: A Report of a Pilot Study Monitoring Cases from First Report to the Police Final Outcome*. Unpublished Report submitted to the Scottish Office Criminological Research; Sue Lees & Jeanne Gregory. (1993). *Rape and Sexual Assault: A Study of Attrition*; Jennifer Temkin. (1999). Reporting Rape in London: A Qualitative Study. *Howard Journal of Criminal Justice*, 38, 17; Paul Wilson. (1978). *The Other Side of Rape*. (1996). *The Crimes (Rape) Act 1991: An Evaluation Report*; Jan Jordan. (2001). Worlds Apart? Women, Rape and the Police Reporting Process. *British Journal of Criminology*, 41, 679, with regard to Australia and New Zealand.
- 389 Phillip Rumney. (2006). False Allegations of Rape. *Cambridge Law Journal*, 65(1), 128, 139.
- 390 The 2 per cent claim derives from a New York study cited by Susan Brownmiller in Susan Brownmiller. (1975). *Against Our Will*. See Phillip Rumney. (2006). False Allegations of Rape. *Cambridge Law Journal*, 65(1), 128, for a summary of the critique regarding this figure. See also Morrison Torrey. (1991). When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions. *UC Davis Law Review*, 24, 1013; and Sedelle Katz & Mary Ann Mazur. (1979). *Understanding the Rape Victim*. The 8 per cent figure derives from the 'unfounding' rates in the FBI's Uniform Crime Reports. It is important to note that the 8 per cent figure is based on official 'unfounding' rates and is therefore overstated as an estimate of false allegations. Police unfound cases for a number of reasons, including a lack of evidence. See, on this point, David P. Bryden & Sonja Legnick. (1987). Rape in the Criminal Justice System. *Journal of Criminal*



- Law & Criminology*, 87, 1194, 1298. The 41 per cent figure comes from Eugene Kanin. (1994). False Rape Allegations. *Archives of Sexual Behavior*, 23(1), 81. From a comparative perspective see Kate Gilmore & Lise Pittman. (1993). *To Report or Not to Report: A Study of Victims/Survivors of Sexual Assault and their Experience of Making an Initial Report to the Police*. For a similar rate of around 8 per cent in the UK see Jessica Harris & Sharon Grace. (1999). *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (Home Office Research Study 196).
- 391 Jan Jordan. (2004). *The Word of a Woman? Police, Rape & Belief*, 73.
- 392 Jan Jordan. (2004). *The Word of a Woman? Police, Rape & Belief*.
- 393 For example, Lisa Frohmann. (1990). Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections. *Social Problems*, 38, 2. Also Rebecca Campbell. (1995). The Role of Work Experience and Individual Beliefs in Police Officers' Perceptions of Date Rape: An integration of quantitative and qualitative methods. *American Journal of Community Psychology*, 23(2), 249.
- 394 Peter Theilade & Jorgen Thomsen. (1986). False Allegations of Rape. *Police Surgeon*, 30, 17, discussed in Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*. Jan Jordan. (2004). *The Word of a Woman? Police, Rape & Belief*, makes a similar finding. Jan Jordan. (2001). *True 'Lies' and False 'Truths': Women, Rape and the Police*.
- 395 Jan Jordan. (2001). *True 'Lies' and False 'Truths': Women, Rape and the Police*.
- 396 Phillip Rumney. (2006). False Allegations of Rape. *Cambridge Law Journal*, 65(1), 128, 130.
- 397 In South Africa, for example, all cases that are 'unfounded', withdrawn by the complainant, and referred to court for prosecutions are treated as 'successful investigations', creating a perverse incentive to classify a case as 'unfounded' rather than 'undetected'. See in general on the question of measuring police performance in South Africa, Ted Leggett. (2003). What do the police do? Performance measurement and the SAPS. *Institute for Security Studies Paper*, 66. Also Gerry Chambers & Ann Millar. (1987). Proving Sexual Assault: Prosecuting the Offender or Persecuting the Victim? In Pat Carlen & Anne Worrall (Eds.), *Gender, Crime and Justice*.
- 398 Phillip Rumney. (2006). False Allegations of Rape. *Cambridge Law Journal*, 65(1), 128, 139.
- 399 For criticism of Kanin's 41 per cent study see Phillip Rumney. (2006). False Allegations of Rape. *Cambridge Law Journal*, 65(1), 128, 139. For possible explanations of this high rate, including the possibility that an official recantation was a prerequisite by the police before allowing victim withdrawal of charges (whether these were true or not) see David P. Bryden & Sonja Legnick. (1987). Rape in the Criminal Justice System. *Journal of Criminal Law & Criminology*, 87, 1194. Kanin himself cautions that his findings are not generalisable.

- 400 Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- 401 Some 'studies' are based on a lack of medico-legal evidence that a rape occurred, while others are based on a subjective *post hoc* assessment of the evidence (with the basis on which this assessment is made left largely unarticulated). These studies, referenced extensively by Phillip Rumney. (2006). False Allegations of Rape. *Cambridge Law Journal*, 65(1), 128, 139, derive largely from the 1970s and early 1980s. Although this is not sufficiently long ago to become complacent about our gains, I will assume that the reader does not need to have the inappropriateness of this approach pointed out.
- 402 Jules Epstein. (2006). True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions. *Quinnipiac Law Review*, 24, 609. Given that Epstein is arguing for the admissibility of evidence of prior false accusations it is particularly important that he adopts a restrictive definition. In this he draws on the judgment of the Alaska Court of Appeals in *Morgan v State*, 54 P.3d 332, 333 (Alaska Ct. App. 2002) ruling that such evidence was admissible where it could be shown: '(1) that the complaining witness made another accusation of sexual assault, (2) that this accusation was factually untrue, and (3) that the complaining witness knew that the accusation was untrue.'
- 403 South African Police Service Standing Order (General) 325, Issued by Consolidation Notice 46 of 2012. Presumably the reference to 'an offence' relates to the offence with which the accused has been charged or the offence complained of in the statement. Unfortunately, the only examples given in the Standing Orders relate to property crimes. The example given is 'where property allegedly stolen is found to have been mislaid or lost or a mistake has been made counting stock, or if it is clear that cattle reported stolen have in fact died from disease, starvation or an accident, drowning or was killed by a wild animal'. No advice is given on how to identify or deal with cases involving humans.
- 404 The notion that women make false reports of rape in order to obtain an abortion is quite easily debunked. The Choice on Termination of Pregnancy Act 92 of 1996 provides that a woman, defined as 'any female person of any age' (s 1(xi)), may, on request, terminate a pregnancy up to 12 weeks into gestation, and between 13 and 20 weeks in consultation with a medical practitioner. While one of the enumerated circumstances to be considered during the latter stage is whether the pregnancy resulted from rape, in terms of s 2(b)(iii) the risk to the woman's physical and mental health is of equal importance, as is the consideration that 'the continued pregnancy would significantly affect the social and economic circumstances of the woman', providing something of a catch-all (ss 2(b)(i) and (iv)). Section 5(3) specifically provides that minors may not be denied access to



- termination of pregnancy. There seems to be little benefit to be obtained from making a complaint of rape as a means of obtaining an abortion. If this is really a consideration informing such complaints, it seems obvious that what is required is more effective public health messaging regarding the availability of abortion services. But again, we come up against the perplexing mixed signals regarding young people's sexuality. Dealing with this myth seems to require nothing more than that police are better educated about legislative developments.
- 405 A charge of rape is not required in order to access post-exposure prophylaxis for HIV. SORMA requires only that a person requiring PEP report to a designated medical centre to obtain anti-retroviral therapy.
- 406 Police officers were adamant on this point: 'The only time they open cases is where they weren't paid or the guy refused to use a condom.'
- 407 It is impossible—and ultimately not very useful—to compare this finding with studies conducted in other jurisdictions. The notion that one can generalise the extent to which rape complainants 'lie' across jurisdictions, which differ so widely in their socio-economic and cultural contexts, seems to me extremely problematic.
- 408 South African Police Service Crime Information Analysis Centre. (nd). *Docket Analysis: Selected Areas: RSA Rape Cases Disposed of as Withdrawn*.
- 409 Sexual Offences Act 23 of 1957; Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. At the time of the Western Cape study s14(1)(a) of the Sexual Offences Act of 1957 made it unlawful for any male to have or attempt to have unlawful carnal intercourse with a girl under the age of 16 years. This prohibition was first enacted in 1916, by way of the Girl's and Mentally Defective Women's Protection Act 3 of 1916 and subsequently repeated in the Sexual Offences Act, the legislation that would have been applicable to the cases in this sample. The prohibition was extended to boy-children in 1988 and included in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which further extends liability to other sexual acts. This law applied at the time of the KZN study.
- 410 Jan Jordan. (2004). *The Word of a Woman? Police, Rape & Belief*.
- 411 See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35. See also Dee Smythe & Bronwyn Pithey (Eds.) (2011). *Sexual Offences Commentary*, s 15. Insofar as this debate takes place in a context where the HIV prevalence rate in South Africa is estimated to be 18.1 per cent it takes on a more compelling public health face. We know that young girls are socially and physiologically at greater risk of contracting HIV than young men. Physiologically women are already at greater risk than men, simply on the basis that they have a greater mucosal area through which transmission can occur. Where that vaginal mucosa is immature and tears, transmission becomes more likely. We also know that they are more likely

to be engaging in sexual activities with men who are sexually active and who may have multiple partners. Moreover, they are not necessarily using a condom. See World Health Organisation. (2008). *Epidemiological Fact Sheet on HIV and AIDS: Core data on epidemiology and response: South Africa*, 2.

- 412 Jonathan Burchell & John Milton. (1997). *Principles of Criminal Law* (2nd ed.), 626.
- 413 Heated legislative debates around the age of consent, which accompanied the passage of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, start to look rather frivolous in the face of such obvious institutional reluctance to pursue these cases. So too a challenge by the National Prosecuting Authority that sought to increase the age of consent to 18 years. See *Geldenhuijs v The State*, Supreme Court of Appeal Case No. 470/2007 (accepting the State's argument that the differential age of 16 and 19 years, respectively, for heterosexual and homosexual consent was unconstitutional, and setting the age for both at 16 years). See also *S v Geldenhuijs* Case No. CCT 26/2008 (rejecting the argument that the age of consent should have been set by the Supreme Court of Appeal at 18 years, per the constitutional definition of a 'child').
- 414 The complainant told the first report witness that she thought she might be pregnant, as the condom had burst. She only reported the alleged rape a month later. The prosecutor concluded that she 'would not make a good witness or a truthful one' and closed the case *nolle prosequi*. No further information is provided in the docket.
- 415 This is a good example of the effect of considering 'downstream' decisions in the criminal justice system, or what Emerson and Paley call 'prospective horizons' in their study of prosecutorial filing decisions. See Robert M. Emerson & Blair Paley. (1991). Organisational Horizons and Complaint-Filing. In Keith Hawkins (Ed.), *The Uses of Discretion*, 231, 239.
- 416 Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 22. Dee Smythe. (2013). Consent, capacity and credibility: incorporating mental disability into teaching on sexual offences and the law, *Disability Catalyst*, 4, 105.
- 417 Jan Jordan. (2004). *The Word of a Woman? Police, Rape & Belief*.
- 418 For example, Jocelyn Scutt. (1993). The Incredible Woman: A Recurring Character in Criminal Law. In Patricia Easteal & Sandra McKillop (Eds.), *Women and the Law*, 46: 'Sex-for-money is one aspect of a woman's sex life which, in the assessment of the court, means she is 'used to sex' and therefore (by some sleight of hand, or perverse 'logic') will not be 'so upset' by rape.'
- 419 Perhaps the main reason for the failure of sex workers to report being raped is the overwhelming evidence that they are subject to the most appalling levels of sexual abuse from police officers in Cape Town. Studies show that sex workers wishing to make a complaint to the police are as likely to be asked for sex, locked up, or raped, as to have their case

- investigated. Chandre Gould (with Nicole Fick). (2008). *Selling Sex in Cape Town* documents comments made by sex workers regarding abuse at the hands of the police and police failure to deal with their complaints.
- 420 By the time that statements were obtained five weeks later from the first report witnesses, the other suspects, positively identified by the witnesses, had moved away from the area.
- 421 Pamela J. Schwikkard. (2008). Getting Somewhere Slowly—The Revision of a Few Evidence Rules. In Lillian Artz & Dee Smythe (Eds.), *Should We Consent? Rape Law Reform in South Africa*, 12.
- 422 Taylor argues that rape myths emphasise women's complicity in their own sexual victimisation and that this tendency towards self-blame is compounded by the 'senseless, brutal nature' of rape and the victim's attempts to make sense of why it happened to her. Julie Taylor. (1987). Rape and Women's Credibility: Problems of Recantation and False Accusations Echoed in the Case of Cathless Crowell Webb and Gary Dotson. *Harvard Women's Law Journal*, 10, 59.
- 423 Deborah Lewis, Benita Moolman & Samantha Waterhouse. (2003). *Report on Gangsterism*.
- 424 The parents of the witnesses initially refused for their children to give statements, eventually agreeing that they do so once the school exams were finished. No statements were, however, ever taken and no explanation is given in the docket. The first witness report corroborated the victim's story and says that the victim was 'very emotional and upset' and 'crying hysterically' when she recounted what had happened to her.
- 425 South African Law Commission. (2002). *Final Report on Project 107: Sexual Offences*, 353. Defeating or obstructing the course of justice is defined as 'unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice'. See Jonathan Burchell. (2006). *Principles of Criminal Law* (rev. 3rd ed.), 939. Perjury is 'the unlawful and intentional making upon oath, affirmation or admonition and in the course of judicial proceedings before a competent tribunal, of a statement which the maker knows to be or foresees may be false' (Burchell at 959). The latter would in fact include 'laying false charges [and] making false complaints' when these are done upon affidavit or sworn statement.
- 426 Jan Jordan. (2004). *The Word of A Woman? Police, Rape & Belief*, 73.
- 427 Jeanne Gregory & Sue Lees. (1996). Attrition in Rape and Sexual Assault Cases. *British Journal of Criminology*, 36(1), 61. Also Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 22, who questions 'why there is so little curiosity among police officers as to why a large number of women might subject themselves to the unpleasant process of reporting rape when they know their account is untrue'.
- 428 Most discussions of false allegations, whether arguing for or against, go back to Sir Matthew Hale's well-worn admonition made in 1680 that rape

'is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.' Matthew Hale. (1739). *The History of the Pleas of the Crown*.

- 429 For example, Edward Greer. (2000). The Truth Behind Legal Dominance Feminism's 'Two Percent False Rape Claim' Figure. *Loyola of Los Angeles Law Review*, 33, 947. (Assailing the 'male bashing' claim made by 'legal dominance feminism' that only 2 per cent of reported rapes were false).
- 430 On the treatment of complainants by the police see Susan Brownmiller. (1975). *Against Our Will*; Diane E. Russell. (1984). *Sexual Exploitation: Rape, Child Abuse and Workplace Harassment*; Jennifer Temkin. (1997). Plus ça change: Reporting Rape in the 1990s. *British Journal of Criminology*, 37, 507. On 'secondary victimisation' see Liz Kelly. (2002). *Routes to (In) Justice: A research review on the reporting, investigation and prosecution of rape cases*; Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293); Jan Jordan. (2001). Worlds Apart? Women, Rape and the Police Reporting Process. *British Journal of Criminology*, 41, 679.
- 431 Jan Jordan. (2001). Worlds Apart? Women, Rape and the Police Reporting Process. *British Journal of Criminology*, 41, 679.
- 432 Various efforts that have been made to reduce secondary victimisation are discussed in Jan Jordan. (2001). *True 'Lies' and False 'Truths': Women, Rape and the Police*; Jan Jordan. (2004). *The Word of A Woman? Police, Rape & Belief*; and Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293). In the South African context see Lillian Artz, Dee Smythe & Ted Leggett. (2003). *Reflections on Integrated Rape Case Management*. The South African Police Service National Instructions 3/2008 set out this imperative in section 5(2) as follows:

During the commission of a sexual offence, the victim normally experiences feelings of powerlessness, helplessness and of being exposed. When reporting the offence to a police official, the victim relives the event and, in so doing, experiences secondary trauma. The secondary trauma is exacerbated if the member conducts the interview in an insensitive manner or unnecessarily touches the victim. On the other hand, the secondary trauma is lessened if the victim is permitted to have a person of his or her choice present to support and re-assure him or her during the interview and if the interview is conducted in surroundings that are either familiar to the victim or are re-assuring to the victim (inducing in him or her a sense that he or she is safe and that what he or she says cannot be heard by others and is treated in confidence).

- 433 Section 9.
- 434 Section 9(2)(a).
- 435 National Instruction 8/2008, section 6.
- 436 Jonathan Burchell & John Milton. (1997). *Principles of Criminal Law* (2nd

- ed.), 499, (citing *R v C* 1955 (4) SA 40 (N)) sets out the criteria for admissibility as follows: '... the complaint should have been made without undue delay, at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complainant could reasonably be expected to make it'.
- 437 Despite a contrary injunction in section 58 of SORMA. For the UK context see Jennifer Temkin. (2002). *Rape and the Legal Process* (2nd ed.), 145.
- 438 The National Instruction, per section 18(1), recommends taking the statement only once the victims has 'recuperated sufficiently' (ideally within 24-36 hours of the incident).
- 439 This tallies with international studies. Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607, 621, describe victims' experiences of the police as generally positive, based on a review of five US studies. Respondents in Temkin's London study also typically reported a positive first encounter with the police. Jennifer Temkin. (1999). Reporting Rape in London: A Qualitative Study. *Howard Journal of Criminal Justice*, 38, 17.
- 440 It is important to note that the victims in this sample were drawn from the Rape Crisis database, and the victims had therefore received some form of mental health intervention, which may have helped them to come to terms with the response of the criminal justice system. See, for example, Clark D. Ashworth & Shirley Feldman-Summers. (1978). Perceptions of the Effectiveness of the Criminal Justice System: The Female Victim's Perspective. *Criminal Justice and Behavior*, 5, 227. Kelly makes the further point that, in general, 'victim satisfaction' studies tend to draw on victims who are willing to be interviewed, which may exclude victims who are particularly alienated. Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*, 18.
- 441 It is worth noting Holmberg's finding that '[w]hen crime victims perceive humanity in the interviewer and feel respected, they become cooperative. They are also more inclined to participate in the investigation.' Ulf Holmberg. (2004). Crime Victims Experiences of Police Interviews and their Inclination to Provide or Omit Information. *International Journal of Police Science & Management*, 6(3), 155, 168.
- 442 The Office of the Director of Public Prosecutions (ACT) and Australian Federal Police recommend, for example, that '[e]nough information should be obtained from the victim to allow for the seizing of relevant forensic material and identification of the alleged offender, with the taking of a detailed statement occurring the next day, after the victim has had time to rest.' Office of the Director of Public Prosecutions (ACT) and Australian Federal Police. (2005). *Responding to Sexual Assault: The Challenge of Change*, 41.
- 443 Section 7 (5).
- 444 Section 8 (3).

- 445 Jan Richardson's definition of vicarious trauma resonates:

Vicarious trauma is the experience of bearing witness to the atrocities committed against another. It is the result of absorbing the sight, smell, sound, touch and feel of the stories told in detail by victims searching for a way to release their own pain. It is the instant physical reaction that occurs when a particularly horrific story is told or an event is uncovered. It is the insidious way that the experiences slip under the door, finding ways to permeate the counselor's life, accumulating in different ways, creating changes that are both subtle and pronounced. Vicarious trauma is the energy that comes from being in the presence of trauma and it is how our bodies and psyche react to the profound despair, rage and pain. Personal balance can be lost for a moment or for a long time. The invasive and intrusive horrors infiltrate and make their mark. The waves of agony and pain bombard the spirit and seep in, draining strength, confidence, desire, friendship, calmness, laughter and good health. Confusion, apathy, isolation, anxiety, sadness and illness are often the result.

Jan Richardson. (2001). *Guidebook on Vicarious Trauma, National Clearinghouse on Family Violence*. Retrieved from <[http://www.hc-sc.gc.ca/hppb/familyviolence/femabus\\_e.html](http://www.hc-sc.gc.ca/hppb/familyviolence/femabus_e.html)>. Although Richardson's definition makes reference to counsellors, this description is apposite to anyone working with victims of trauma.

- 446 Botho Molosankwe. Police officer fired for soliciting bribe. *The Star*, 6 December 2007.
- 447 Judith Lewis Herman. (2005). Justice from a Victim's Perspective. *Violence Against Women*, 11, 571, 574. Heath and Naffine argue that these laws therefore constitute a fraud against women. Mary Heath & Ngaire Naffine. (1994). Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law 'Reform'. *The Australian Feminist Law Journal*, 3, 30. Liz Kelly makes the point that 'Attrition research identifies a paradox internationally: despite widespread reform of statute and law and, in many jurisdictions, procedural rules, the 1990s witnessed declining or static conviction rates.' Liz Kelly, Jo Lovett & Linda Regan. (2005). *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293), 30. Kelly (2002) illustrates that over a 30 year period in England and Wales we have seen a progressive increase in the reporting of rape cases to the police coupled with a relatively static conviction rate. She notes that in 1977 one in three reported rapes resulted in a conviction, but by 1999 this had dropped to only one in 13. Liz Kelly. (2002). *Routes to (In)Justice: A research review on the reporting, investigation and prosecution of rape cases*. Reflecting on their UK study, Gregory and Lees make the point that '... the sexual assaults that are reported ... are the mere tip of an iceberg of staggering proportions. It is all the more puzzling to discover that a large proportion of these reports fall away at later stages in the criminal justice process.' Jeanne Gregory & Sue Lees. (1999). *Policing Sexual Assault*, 59.

- 448 This position is not peculiar to South Africa. On police responses to domestic violence in the UK, for example, Hester writes that '[t]he police and criminal justice agencies tended to view those who were victimised as being key to attrition.' Marianne Hester. (2005). Making it through the criminal justice system: Attrition and domestic violence. *Social Policy & Society*, 5(1), 79, 82.
- 449 Ted Leggett. (2003). The Sieve Effect: South Africa's Conviction Rates in Perspective. *SA Crime Quarterly*, 5, 11. The SAPS Crime Information Analysis Center (CIAC) articulates similar expectations in their conclusions: 'Although the Criminal Justice System cannot be exonerated, it is evident that the victim plays a cardinal role in the process of securing a conviction, in terms of being available and cooperative during the investigation and court process.' CIAC Monitor. (2002). *Analysis: Rape and Attempted Rape Statistics as of June 2001*, 7. Complainants should not withdraw their complaints, they should be available, and they should be cooperative. Implicitly, according to CIAC, they are not.
- 450 Shearing and Shaw both note that transitions from authoritarian systems to democracy are marked by increases in crime and social unrest. Shearing ascribes this to a 'security vacuum'. Clifford Shearing. (2003). Crime, Rights and Order: Reflections on an Analytical Framework. In James Cavallaro (Ed.), *Crime: Managing Public Order in Countries in Transition*; Mark Shaw. (2000). Crime and policing in transitional societies: conference summary and overview. In The South African Institute of International Affairs (Ed.) *Crime and policing in transitional societies*.
- 451 Newham (2005) suggests a further reason, arguing that the lack of attention to internal disciplinary processes and accountability within the post-apartheid police service resulted from the pragmatic political need to build confidence within the police towards the new government, which could not be seen to be engaging in a 'witch-hunt' against representatives of the 'old order'. He takes the position that '[p]lacing too much emphasis on establishing systems to identify and remove problematic officers at this time was viewed as antithetical to building the confidence of the security services in the new government'. Gareth Newham. (2005). Strengthening Democratic Policing in South Africa through Internal Systems for Officer Control. *South African Review of Sociology*, 36(2), 160, 168.
- 452 This mirrors contemporary evidence from other jurisdictions. Janice Du Mont, Karen-Lee Miller & Terri L. Myhr. (2003). The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women. *Violence Against Women*, 9(4), 466; Jan Jordan. (2004). *The Word of A Woman? Police, Rape & Belief*; Patricia A. Frazier & Beth Haney. (1996). Sexual Assault Cases in the Legal System: Police, Prosecutor, & Victim Perspectives. *Law & Human Behaviour*, 20(6), 607, 621.
- 453 Robert Reiner. (1994). Policing and the Police. In Mike Maguire, Rod Morgan & Robert Reiner (Eds.), *The Oxford Handbook of Criminology*, 128.
- 454 Gareth Newham. (2005). Strengthening Democratic Policing in South



- Africa through Internal Systems for Officer Control. *South African Review of Sociology*, 36(2), 160, 162. Newham emphasises that over this period there has been 'inadequate attention paid to officer supervision and oversight' (at 166).
- 455 South African Police Service. (2004). *Strategic Plan: 2004-7*; South African Police Service. (nd). *Strategic Plan for the South African Police Service 2005-2010*; South African Police Service. (nd). *Strategic Plan 2010-2014*.
- 456 Stanko provides a useful review of studies that suggest that this differentiation between victims who deserve assistance and those who are simply hopeless cases pervades police practice around domestic violence across a number of jurisdictions. Elisabeth A. Stanko. (1995). Policing Domestic Violence: Dilemmas and Contradictions. *The Australian and New Zealand Journal of Criminology*, 26, 31.
- 457 Mmamotsheli Motsei. (2008). *The Kanga and the Kangaroo Court: Reflections on the Rape Trial of Jacob Zuma*, 34. The complainant in the case, the daughter of a longstanding family friend of the accused, Jacob Zuma, was so vilified by his supporters, who burned effigies of her outside the court that she needed to be resettled in the Netherlands after the trial for her own safety.
- 458 As Comack and Peter argue, the 'ideal victim' is now 'essentially one who lives up to the neo-liberal ethos: she is reasonable, rational, and responsible and demonstrates that she can make the 'right' choices in her own self governance.' Elisabeth Comack & Tracey Peter. (2005). How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage Between 'Responsibilisation' and 'Blaming the Victim'. *Canadian Journal of Women and Law*, 17, 283, 298. Bumiller makes an important and extended argument against the neo-liberal state's appropriation of violence against women in Kirsten Bumiller. (2008). *In An Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence*.
- 459 Alyson Cole describes the backlash against victims in the United States and the valorisation of 'true victimhood'. She suggests that it is not 'the veracity of petitions or the facts of injury' that validate a claim of victimisation, but the qualities exhibited by the person. They should act with propriety (noble, dignified, uncomplaining), individuality (responding to an 'immediate and concrete' personal harm, not one that is group-based), take responsibility (by 'commanding his fate'), and, above all, they should be completely and incontrovertibly innocent. Alyson Cole. (2006). *The Cult of Victimhood: From the War on Welfare to the War on Terror*, 5.
- 460 South African Police Service. (2005). *Annual Report 2004/5*.
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- 462 In deliberations on this provision, the ACDP wanted the age of consent raised to 18 years. Debates of the Portfolio Committee on Justice & Constitutional Development for 15 September 2003 and 20 June 2006 are available at <www.pmg.org.za>.
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- 465 Correspondence with SAPS dated 2005/03/04. (On file).
- 466 I was informed that a moratorium had been imposed on all 'external' research and that henceforth any research conducted within the NPA's Sexual Offences and Community Affairs Unit would be internally commissioned. These difficulties with gaining access were reflective of a broader trend in South African politics at the time, which limited access by civil society to information held by government.
- 467 Correspondence with SAPS dated 2006/07/10. (On file).
- 468 This study therefore falls outside of the 2004/5 *reporting* year, being 1 April 2004 to 31 March 2005, and is thus not directly comparable to publicly available SAPS statistics.
- 469 A further request was made by the Provincial Commissioner to include a junior researcher from the Crime Information Analysis Centre in the study in order to assist with building research capacity at the CIAC. Sgt Patience Kwadu participated in data entry and commented on aspects of the analysis. The process was also used to better familiarise her with the research methodology and the purpose of the research. This was important both for the integrity of the study and in terms of my commitment to the SAPS to use the study to improve research capacity at the CIAC.
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- 471 Given the relatively small number of interviews conducted within a closed working environment it was not possible to guarantee interviewees absolute anonymity. All interviewees were made aware of this constraint before consenting to the interview. Interviews took on average 90 minutes and were conducted at the relevant police station. Four were voice recorded and transcribed. Two participants requested not to be recorded and, accordingly, I took notes. Only two of the interviewees were first language English speakers. Two were Xhosa-speaking and two Afrikaans, although responses were largely provided and captured in English. Where necessary I translated comments made in Afrikaans.

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